Supreme Court, U.S.
FILED

001246 JAN 31 2001

No. _____

In The

Supreme Court of the United States

DANIEL REED, BY AND THROUGH HIS CONSERVATOR, JOLAINE ALLEN,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT W. PETERSON
Counsel of Record
SHEA & SHEA
A PROFESSIONAL LAW CORPORATION
255 North Market Street
Suite 190
San Jose, CA 95110
(408) 292-2434

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

92pp

QUESTIONS PRESENTED

In 1996 the Bureau of Land Management (BLM) issued a permit for a large (over 5,000 people), 5-day, commercial camping event on BLM land. On the last day of the event a participant drove his car over petitioner while petitioner was sleeping in his tent. Petitioner suffered permanent brain damage.

The question presented is whether all of the following acts or omissions by the agents of the BLM are decisions based on public policy and, therefore, protected by the discretionary function exception to the Federal Tort Claims Act (28 U.S.C. § 2680(a)):

1. Failure to follow the regulation and BLM Manual which mandate temporary suspension of the permit when the promoters violated the permit by allowing the event to become unreasonably dangerous to the public.

2. Failure to warn the public, or require the promoters to warn the public, that lack of traffic control at the event made it dangerous to sleep in unprotected tents on the ground.

3. Failure to follow objective event-planning standards which dictate separation of cars from campers at events of this size.

PARTIES TO THE PROCEEDING

Petitioner is Daniel Reed, by and through his conservator, Jolaine Allen. Petitioner was plaintiff in the trial court and appellant in the court of appeals. Respondent is the United States Department of the Interior, Bureau of Land Management. All parties agree that the United States is the proper party respondent under the Federal Tort Claims Act.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT 3

REASONS FOR GRANTING THE PETITION 9

MANDATORY DUTIES UNDER REGULATION AND THE BLM MANUAL 16

DUTY TO WARN 19

APPROVAL OF BURNING MAN'S SITE-PLAN MIXING CARS AND CAMPERS 25

CONCLUSION 30

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Allen v. United States, 816 F.2d 1417 (10th Cir. 1987) 15

Andrulonis v. United States, 952 F.2d 652 (2d Cir. 1991) 27

Ayala v. United States, 980 F.2d 1342 (10th Cir. 1992) 18, 27

Berkovitz v. United States, 486 U.S. 531 (1988) .... *passim*

Boyd v. United States, 881 F.2d 895 (10th Cir. 1989) 23, 24, 25

Caplan v. United States, 877 F.2d 1314 (6th Cir. 1989) 27

Cope v. Scott, 310 U.S. App. D.C. 144, 45 F.3d 445 (D.C. Cir. 1995) 22, 23

Domme v. United States, 61 F.3d 787 (10th Cir. 1995) 24

Duke v. Department of Agriculture, 131 F.3d 1407 (10th Cir. 1997) .... *passim*

Estate of Bernaldes v. United States, 81 F.3d 428 (4th Cir. 1996) 18

Faber v. United States, 56 F.3d 1122 (9th Cir. 1995) 19, 25

Fitchett v. Buchanan, 472 P.2d 623 (Ct. App. Wash. 1970) 13

Gaubert v. United States, 499 U.S. 315 (1991) .... *passim*

TABLE OF AUTHORITIES – Continued

Page

George v. United States, 735 F. Supp. 1524 (M.D. Ala. 1990) 23, 24, 25

Goewey v. United States, 886 F. Supp. 1268 (D.S.C. 1995) 14

Gotha v. United States, 115 F.3d 176 (3rd Cir. 1997) 9, 26, 29

Indian Towing v. United States, 350 U.S. 61 (1955) 12

Lesoeur v. United States, 21 F.3d 965 (9th Cir. 1994) 25

Lindgren v. United States, 665 F.2d 978 (9th Cir. 1982) 20

Mayer v. Unites States, 774 F. Supp. 1114 (N.D. Ill 1991) 28, 29

McMurray v. United States, 918 F.2d 834 (9th Cir. 1990) 23

Myers v. United States, 17 F.3d 890 (6th Cir. 1994) ... *passim*

Rosebush v. United States, 119 F.3d 438 (6th Cir. 1997) 15

Sexton v. United States, 797 F. Supp. 1292 (E.D.N.C. 1991) 28

Smith v. United States, 546 F.2d 872 (10th Cir. 1976) 23

Turpel v. Sayles, 692 P.2d 1290 (Sup. Ct. Nev. 1985) 13

TABLE OF AUTHORITIES – Continued

Page

United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947) 13

United States v. S.A. Empresa de Viacao Aereo Rio Grandense (Varig Airlines), 467 U.S. 797 (1984) 10, 20, 21

STATUTES

16 U.S.C. § 528 21

16 U.S.C. § 1600(6) 21

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1346(b) 1, 3

28 U.S.C. § 1367 3

28 U.S.C. § 2680(a) 1, 2, 3

REGULATIONS

43 C.F.R. § 2920.1-1 2

43 C.F.R. § 2920.1-1(b) 13

43 C.F.R. § 2920.9-2 ..... 2, 5

43 C.F.R. § 2920.9-3 ..... *passim*

43 C.F.R. § 8372.3 2

43 C.F.R. § 8372.5 ..... 2, 4, 29

NRS § 41.510 ..... 2, 13

OTHER AUTHORITIES

BLM Manual, H-8372-1, VIIC 2, 7, 16

Forest Service Manual (FSM) § 7160.43 21

TABLE OF AUTHORITIES – Continued

Page

Note, *Government Tort Liability*, 111 Harv. L. Rev. 2009, 2023 (1998) 14

Restatement 2d Torts § 359 13

A. Hackman, *Note and Comment: The Discretionary Function Exception to the Federal Tort Claims Act: How Much is Enough?*, 19 Campbell L. Rev. 411 (1997) 18

Bruce A. Peterson & Mark E. Van Der Weide, *Susceptible to Faulty Analysis: United States v. Gaubert and the Resurrection of Federal Sovereign Immunity*, 72 Notre Dame L. Rev. 447, 450, 487, 501, 502 (1997) 14

Harold Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort*, 38 U.C.L.A. L. Rev. 871, 914 (1991) 14

Laul Levmore, *Takings, Torts, and Special Interests*, 77 Va. L. Rev. 1333, 1351 (1991)..... 29

Medora Marisseau, *Comment, Seeing Through the Fallout: Radiation and the Discretionary Function Exception*, 22 Envt. L. 1509, 1538 (1992) 14

W. P. Kratzke, *The Convergence of the Discretionary Function Exception to the Federal Tort Claims Act with Limitations of Liability in Common Law Negligence*, 60 St. John's L. Rev. 221, 222-23 (1986) 12

William P. Kratzke, *The Supreme Court's Recent Overhaul of the Discretionary Function Exception to the Federal Tort Claims Act*, 7 Admin. L.J. Am. U. 1, 32 (1993) 14

TABLE OF AUTHORITIES – Continued

Page

TREATISES

Peter H. Schuck, *Suing Government: Citizen Remedies for Official Wrongs* 41 (1983)..... 14

Prosser & Keeton on the Law of Torts 1042 n.12 (5th ed., student ed. 1984)..... 14

PETITION FOR A WRIT OF CERTIORARI

Petitioner Daniel Reed, by and through his conservator, Jolaine Allen, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals affirming the district court's grant of summary judgment (App. 1) is reported at 231 F.3d 501. The opinion was filed on November 2, 2000. The district court's opinion (App. 2) is reported at 29 F. Supp.2d 1121.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 1346(b) of Title 28 of the United States Code provides, in relevant part:

> § 1346(b)(1). "[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States . . . for personal injury or death caused by the negligent or wrongful act or omission of any employee . . . under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." (App. 35).

2. Section 2680(a) of the United States Code provides, in pertinent part:

§ 2680. "The provisions of . . . section 1346(b) . . . shall not apply to –

(a) Any claim based upon . . . performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the Government, whether or not the discretion involved be abused." (App. 36).

3. 43 C.F.R. § 8372.3 provides:

"The approval of an application and subsequent issuance of a special recreation permit is discretionary with the authorized officer." (App. 36).

4. 43 C.F.R. § 2920.9-3 provides in pertinent part: § 2920.9-3(b)(1).

"Upon determination that there is noncompliance with the terms and conditions of a land use authorization which adversely affects the public health, safety or welfare or the environment, the authorized officer shall issue an immediate temporary suspension." (App. 39).

5. Relevant portions of the BLM Manual, H-8372-1, VIIC provide:

"Permits shall be immediately suspended, and other appropriate penalties imposed, for violations of Federal, State, or local laws, regulations, or permit stipulations providing for the safety or health of the public. An example could be the lack of a required local license for food service. Alleged violations will be brought to the attention of the involved permittee(s) by the authorized officer. . . . " (App. 46-47).

6. 43 C.F.R. § 2920.1-1 (App. 49), 43 C.F.R. § 2920.9-2 (App. 39), 43 C.F.R. § 8372.5 (App. 37-38), NRS § 41.510 (App. 50).

STATEMENT

The Black Rock Desert playa in Nevada is remote, dusty, dry lake bottom. It is one of the most desolate, and one of the flattest places on Earth. There are no natural barriers whatsoever, nor are there roads. The playa is owned by the United States and is managed by the Bureau of Land Management (BLM).

On the morning of September 2, 1996, Mr. Daniel Reed (plaintiff and petitioner here) was sleeping in his tent on the playa when a car crushed him. Petitioner sustained permanent and disabling injuries, including permanent brain damage.

Petitioner filed suit against the United States (respondent here) and others, contending that the negligence of the BLM and its agents contributed to the happening of this tragic injury. Jurisdiction was based on 28 U.S.C. § 1346(b)(1) (Federal Tort Claims Act) and on 28 U.S.C. § 1367 (supplemental jurisdiction). On the United States' motion for summary judgment, the District Court dismissed the claims against the United States based on the discretionary function exception to the Federal Tort Claims Act (FTCA). 28 U.S.C. § 2680(a). The Ninth Circuit court of appeals affirmed on the same basis.

Pursuant to the congressional and regulatory policy of managing this land for multiple (including recreational) uses, the BLM granted a permit to Mr. Larry Harvey, a promoter, to hold a commercial event called "Burning Man" on the playa. Like a private landowner, the BLM has discretion to grant or deny applications for permits for commercial use of this land. 43 C.F.R. § 2920.9-3(b)(1) (App. 8). The promoter and the BLM expected attendance of over 5,000 people. Many, like petitioner, would be attending for the first time. In fact,

over 10,000 attended. The event is remote and was to last 5 days, so large numbers would bring cars and camp on the playa. In addition to its permit fees, the BLM collected $2 for each person who attended. The Ninth Circuit's description of Burning Man is apt: Burning Man is a "punk-pagan celebration" (App. 4); "ritualistic . . . anarchic . . . primal . . . a radical communal experiment . . . art . . . death of art . . . drama-like . . . surreal . . . creative . . . destructive . . . absurd . . . spiritual" and "real." (App. 4).

Like any landowner hosting an event of this size and nature, the BLM could include in its permit "such stipulations as the authorized officer considers necessary to protect the lands and resources involved and the public interest in general." 43 C.F.R. § 8372.5(b). (App. 37). Objective standards for events of this size, which include large numbers of cars and campers, require physical separation of cars from campers. Excerpt of Record hereinafter "ER" Tab 73, Ex. M & N (Affidavits of Engineer Presswood and Safety Engineer Jennings). For this event, separation was even more imperative. There are no natural barriers on the playa, and from past experience the BLM was aware that traffic on the playa raised dense dust clouds that severely impaired visibility even during daylight hours. Nevertheless, the BLM approved a site plan which mixed cars and campers. Indeed, it permitted cars and campers to drive virtually anywhere on the playa, *ad libitum*, day or night. In addition, although warnings about other hazards of the desert were given to participants, and drivers were warned to "Use caution when turning at higher speeds. Tires will not slide on the alkali and vehicles will roll over" (ER II, Tab 64, Attachment B, page 2, paragraph titled "Playa Driving"), the BLM did not warn campers, nor require the promoters to

warn campers that the uncontrolled traffic and the nature of the playa made it dangerous to sleep in unprotected tents on the playa. Campers were only told not to sleep in *sleeping bags away from their cars.* (ER Tab 64, "Survival Guide" at 2).

While there may be policy decisions surrounding whether Burning Man should or should not be granted a permit to hold this event on federal land – including, for example, environmental concerns – petitioner contends that failure to follow objective, fundamental site-plan criteria for events of this size implicates no social, economic or political policy within the ambit of the discretionary function exception. Likewise, the failure to warn campers, or require the promoter to warn campers of these dangers implicates no social, economic or political policy. The Ninth Circuit rejected petitioner's argument.

Burning Man was an around-the-clock event. In part because of the extreme daytime heat, much activity took place at night. As it is required to do (43 C.F.R. § 2920.9-2) (App. 39), the BLM monitored this event as it unfolded (although it chose to leave the event by 10:00 p.m. every evening).

As the event swelled to twice its expected size, Lieutenant William Barks, who also monitored the event in conjunction with the BLM, characterized it as "out of control." ER Tab 73, Ex. R at 8. By Thursday afternoon the driving was treacherous due to the extensive number of vehicles on the playa and visibility that was limited to 20-100 feet. *Id.* at 7. There were numerous drunk drivers. *Id.* at 8. In some cases visibility became non-existent. ER Tab. 73, Ex. U at 20. He also testified in deposition that,

prior to petitioner's injury, he observed numerous violations of state law that would affect the safety of participants. *Id.* at 65. On August 31, two days before Petitioner's injury on September 2, Deputy Edmonson arrived at 10:00 p.m. and made 15 to 20 stops in an hour and one-half. He stated that "People were driving very fast, some without headlights and most with an unsafe number of people in and on the cars." ER Tab 73, Ex. R at 18. On August 31st and September 1st, Sheriff Okuma made similar observations, including reckless driving, driving under the influence of alcohol and narcotics, driving without headlights, and other observations best left in the record. ER Tab 7, Ex. R at 19. The danger they presented was compounded by the fact that there were a number of satellite camps and campers, and no traffic control. Sergeant S. Cantrell's report states "With a combination of intoxicated drivers, hanging dust, low visibility, and dark camps I think we were lucky that we did not have more vehicle vs. camp problems." ER Tab 73, Ex. R at 31. Sheriff Skinner, who also monitored the event, testified in deposition that in his opinion as a law enforcement officer the 1996 event was "unsafe for the participants." ER Tab 73, Ex. T at 23; *see also* ER Tab 73, Ex. P at 4.

There were six emergency, life-flight helicopter trips to Burning Man. ER Tab 73, Ex. P at 7. Apparently, one helicopter was damaged and had to return for repairs when participants threw rocks at it. ER Tab U at 48-49.

It is petitioner's contention that the on-site BLM personnel knew or should have known of the danger to the public which was obvious to the other law enforcement personnel. Law enforcement personnel discussed their observations among themselves and with the BLM. ER

Tab 73, Ex. U at 36-37. Although irrelevant to the discretionary function issues, the government argued below that the danger should even have been obvious to petitioner (Gov. Brief, p. 29). However benignly the BLM may have anticipated the event to unfold, it was now clear that the event had become unreasonably dangerous to the public. Like the agents of any Nevada rancher hosting a large public event, the BLM's agents had, at a minimum, a common law duty to warn, or require the promoter to warn that camping in unprotected tents on the playa was now very dangerous. The BLM's agents failed to do so. The Ninth Circuit disagreed with petitioner's argument that this act or omission of the BLM's on-site employees was not grounded in social, economic or political policy.

A landowner licensing land for such an event would require the promoter to take primary responsibility for public safety. The BLM permit followed this practice. The permittee agreed to "assume responsibility for public safety and health" and to be "responsible for all acts of safety associated with the event." ER Tab 60, Ex. A at page 106, Special Permit Conditions 1 and 1(a).

Failure to comply with this term requires immediate temporary suspension of the permit. 43 C.F.R. § 2920.9-3(b)(1) (App. 39) states:

> Upon determination that there is noncompliance with the terms and conditions of a land use authorization which adversely affects the public health, safety or welfare or the environment, the authorized officer *shall* issue an immediate temporary suspension. [Emphasis added].

The BLM Manual, H-8372-1, VIIC (App. 46) also speaks in mandatory language when it states:

> "Permits *shall* be immediately suspended, and other appropriate penalties imposed, for violations of Federal, State, or local laws, regulations, or permit stipulations providing for the safety or health of the public." [Emphasis added].

To illustrate, the Manual gives one example: "the lack of a required local license for food service." The danger to the public illustrated by this example falls well short of the dangers to campers presented by cars during this out-of-control event.

The government in its brief below (Gov. Brief, p. 34) and Mr. Cribley, who issued the permit for the BLM, (ER Tab 66 at 5) both conceded that if a permittee violates the terms and conditions affecting public safety or health, they must temporarily suspend the permit. The BLM's own post-event review notes the promoter's inadequate supervision (via its group of volunteers, the "Black Rock Rangers") violated the terms of the permit. The report states "if violated again [it] will result in immediate, automatic permit revocation and event closure." ER Tab 60, Ex. A at 2227.

Although any Nevada rancher hosting this event would owe a similar duty to act on this information, nevertheless, the Ninth Circuit dismissed the relevance of these mandatory duties and policies, arguing that failure to determine that a permittee is endangering the public in violation of its permit is a discretionary function. (App. 14). Thus, the choice not to know what they knew or should have known is, in the Ninth Circuit's view, based on social, economic or political policy.

Petitioner contends that this is an unduly expansive interpretation of the exception as defined by Congress and this Court. Even if on-site monitors choose not to

know what they know or should know, petitioner contends they are not making social, economic or political policy in doing so. Like the driver of an automobile, their exercise of discretion is not grounded in regulatory policy. *Gaubert v. United States*, 499 U.S. 315, 325 n.7. This conduct on the part of any Nevada rancher hosting the event (a Nevada rancher did host the event the following year), would merely be "garden-variety" negligence.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's application of the discretionary function exception to the Federal Torts Claims Act (FTCA) conflicts with a number of other circuits. It conflicts with the Tenth Circuit's decision in *Duke v. Department of Agriculture*, 131 F.3d 1407 (10th Cir. 1997) outlining when the exception does not immunize the government from its duty to warn public invitees about dangers on public land. It conflicts with the Third Circuit's decision in *Gotha v. United States*, 115 F.3d 176, 181-82 (3rd Cir. 1997) rejecting broad or fanciful claims of policy based decisions when the government is guilty of "garden-variety" negligence. It conflicts with the Sixth Circuit's decision in *Myers v. United States*, 17 F.3d 890 (6th Cir. 1994) rejecting the application of the discretionary function exception to mere findings of violations of permit conditions or regulations. Moreover, the primary source of confusion among the circuits arises from disagreement about the scope of a dictum in this Court's decision in *Gaubert v. United States*, 499 U.S. 315 (1991). In *Gaubert*, this Court suggested that the discretionary function exception immunizes any negligent conduct of the

government if the conduct is merely "susceptible to policy analysis." *Id.* at 325. Broad application of this language outside the regulatory context in which it was written has created confusion, inconsistency, unpredictability, and arbitrary application of this exception to the FTCA. It discourages adoption of mandatory guidelines where they would be in the public interest, and it invites fanciful speculation about possible policy bases for decisions where few or none exist. The ambit of this dictum is an important question of federal law affecting hundreds, and possibly thousands, of claims. It needs to be clarified.

This Court last visited the discretionary function exception to the Federal Tort Claims Act ten years ago. In a trilogy of cases (*United States v. S.A. Empresa de Viacao Aereo Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984); *Berkovitz v. United States*, 486 U.S. 531 (1988); and *Gaubert v. United States*, 499 U.S. 315 (1991)) this Court moved from the planning level/operational level approach to its current two-tiered approach to the exception.

Now courts must ask first whether a federal statute, regulation, or policy specifically prescribes a course of action for a federal employee to follow. If so, the discretionary function inquiry ends. If, however, there is an element of choice, the court must then ask whether the choice or judgment "is of the kind that the discretionary function exception was designed to shield," which "protects only governmental actions and decisions based on considerations of public policy." *Berkovitz*, 486 U.S. at 536-37. It is now the "nature of the conduct, rather than the status of the actor" that governs whether the exception applies. *Gaubert*, 499 U.S. at 322.

Plaintiffs in each of these three cases based their claims on alleged negligent regulation of private conduct.

Varig addressed regulation of aircraft safety; *Berkovitz* addressed the licensing of vaccines; and *Gaubert* addressed regulation of the thrift industry. In these regulatory contexts it is not surprising that the discretionary function exception is given broad scope. As this Court stated in *Varig*:

> "[W]hatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals." *Varig*, 467 U.S. at 813-14 (1984).

It was in the last of these three regulatory cases that this Court included a dictum that has thrown lower federal courts into a decade of confusion and conflict. In *Gaubert* this Court stated that:

> "The focus of the inquiry is not on the agent's subjective intent in exercising the discretion . . . but on the nature of the actions taken and on whether they are *susceptible to policy analysis.*" *Gaubert*, 499 U.S. at 325, [Emphasis added].

This language invites the government, after the fact, to hypothesize any conceivable policy basis that may have impinged on the decision regardless of whether it played any role whatsoever. This gives the exception the broadest possible sway.

The scope of this dictum and its application to the traditional negligence calculus present important issues of federal law that have not been, and should be, settled by this Court. In addition, its application has resulted in conflicts among the United States courts of appeals touching almost every Federal Tort Claims Act case outside the area of automobile accidents.

It is one thing to mantle regulatory functions in broad immunity. The government has no pre-existing duty to regulate, so these cases have a low claim on the tort system for redress.[1] As Professor Kratzke notes, "truly discretionary decisions, after all, are decisions that are not constrained by any legal standards" and would not be compensated under ordinary tort law, even in the absence of the discretionary function exception. W.P. Kratzke, *The Convergence of the Discretionary Function Exception to the Federal Tort Claims Act with Limitations of Liability in Common Law Negligence*, 60 St. John's L. Rev. 221, 222-23 (1986).

---

[1] Although the question whether the government's acts were negligent is outside the discretionary function inquiry (*Berkovitz*, 486 U.S. at 535 n.2), it may be helpful to juxtapose the two in context. The cases and Restatement sections touching these issues are collected in *Myers v. United States*, 17 F.3d 890, 898-904 (6th Cir. 1994) (negligent mine inspection not actionable under state tort law). Unless Congress intended otherwise, a regulatory scheme creates no private federal cause of action. Thus, the government is liable only if a "private party" would be liable under state law. Since private parties do not regulate, there is no comfortable state law analogy. The rules surrounding Good Samaritans come closest. Although there is no duty to rescue (i.e., regulate), under some circumstances one who negligently performs a voluntary undertaking may be liable, but only if the conduct increased the risk through reasonable and justifiable reliance or by affirmatively making the situation more likely to cause harm. Consequently, negligent government regulation will often fail to create a cause of action under state law. An example where a claim would lie is *Indian Towing v. United States*, 350 U.S. 61 (1955) in which the government was liable because it created reasonable reliance on a lighthouse yet failed to maintain it. *Myers, supra*, is an example where a claim would not lie.

It is quite another to extend the same broad immunity when the government is acting as a property owner – especially when it is renting its land for a private, for profit function that would be as at-home on private land. The FTCA makes the government subject to the same pre-existing duties as any private landowner *unless* the discretionary function exception applies.[2] Referring to *Indian Towing v. United States*, 350 U.S. 61 (1955) (government liable for failure to maintain lighthouse on federal land) this Court noted that insuring the lighthouse was operational "did not involve any permissible exercise of policy judgment." *Berkovitz*, 486 U.S., at 538 n.3, *Gaubert*, 499 U.S., at 326.

Since the classic negligence calculus requires balancing the marginal cost of safety against the marginal savings in injury (Justice Learned Hand's test in the famous case of *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947), is perhaps the most widely accepted – negligence is the failure to take precautions when the

---

[2] While there is no duty to regulate, a private landowner, by contrast, owes a duty of reasonable care to members of the public on its land. In Nevada, this duty extends even to landlords who have leased the land. *Turpel v. Sayles*, 692 P.2d 1290 (Sup. Ct. Nev. 1985). It should be noted that, under applicable regulations, Burning Man was merely a licensee, not a lessee. 43 C.F.R. § 2920.1-1(b) (A permit "conveys no possessory interest"). Even courts recognizing some immunity for lessors still extend a duty when the property is leased for an event, like Burning Man, which is open to the general public. Restatement 2d Torts § 359, *Fitchett v. Buchanan*, 472 P.2d 623 (Ct. App. Wash. 1970) (landlord liable for injury to person in grandstand hit by tire). Finally, Nevada's Recreational Use Statute (NRS § 41.510), which extends immunity to landowners with respect to recreational users, is inapplicable because the BLM collected a "consideration" ($2 per person) for use of its land.

marginal cost of the precautions (including lost utility) is less than the marginal cost of injuries avoided), one may posit a hypothetical "policy" basis for any negligent act. This is especially so when courts equate mere cost with economic policy. See, e.g., *Goewey v. United States*, 886 F. Supp. 1268, 1277-78 (D.S.C. 1995) (hiring contractor and monitoring contractor's work involved economic considerations). See also, Prosser & Keeton on the Law of Torts 1042 n.12 (5th ed., student ed. 1984) (the "cost-benefit assessment is typical in deciding the negligence issue and it also appears in many cases on the [issue of] discretionary immunity").

Thus, this dictum in *Gaubert* has virtually destroyed the second prong of this Court's two step analysis. Thoughtful scholars agree.[3] Some courts have also

---

[3] Bruce A. Peterson & Mark E. Van Der Weide, *Susceptible to Faulty Analysis: United States v. Gaubert and the Resurrection of Federal Sovereign Immunity*, 72 Notre Dame L. Rev. 447, 450, 487, 501, 502 (1997) (exception should be confined to "decisions of a uniquely governmental – i.e., policy – nature," should apply only when the government actually considered policy factors, and courts should "apply the negligence calculus to government conduct precisely in those cases where the state ought to act like a reasonably careful private citizen."); Harold Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort*, 38 U.C.L.A. L. Rev. 871, 914 (1991) (exception should apply only to decisions that implicate social, economic, or political policy and that involve substantial agency deliberation); William P. Kratzke, *The Supreme Court's Recent Overhaul of the Discretionary Function Exception to the Federal Tort Claims Act*, 7 Admin. L.J. Am. U. 1, 32 (1993) ("The discretionary function exception should immunize government decisions only when cases present policy questions that do not lend themselves to resolution by adjudication."). See also, Peter H. Schuck, *Suing Government: Citizen Remedies for Official Wrongs* 41 (1983); Note, *Government Tort Liability*, 111 Harv. L. Rev. 2009, 2023 (1998); Medora Marisseau, Comment, *Seeing Through the*

registered their discomfiture with the test. *Rosebush v. United States*, 119 F.3d 438, 444 (6th Cir. 1997) (discretionary function exception has "swallowed, digested, and excreted the liability-creating sections of the Federal Tort Claims Act"), *Allen v. United States*, 816 F.2d 1417, 1424-25 (10th Cir. 1987) (McKay, J., concurring) (FTCA is a "false promise" reaching only claims for wrongs based on "the most trivial of matters").

With the second prong of this Court's test so enfeebled, those injured by government negligence must base their claims almost exclusively on mandatory duties in statutes, regulations, manuals or policies. Since mandatory duty is now, *de facto*, the trigger for liability, this in turn may discourage administrators with an eye on liability from promulgating regulations, manuals or policies which should be mandatory. In *Myers v. United States*, 17 F.3d 890, 898-905 (6th Cir. 1994) the court decried the race-to-the-bottom created by the disappearance of the second prong of the *Gaubert* test.

> "[I]t encourages litigation as plaintiffs search diligently through agency regulations, manuals and memoranda in search of some restriction on discretion. Finally, it improperly discourages a regulatory agency from defining for itself the standard of conduct it expects of its employees, lest those standards be turned against it in future litigation." *Myers*, 17 F.3d at 905.

Obviously, this unintended consequence of the dictum in *Gaubert* is not in the public interest. Were there a core of conduct for which the government is responsible under the FTCA (as there was under the previous planning/operational test), then the incentives would reverse.

Fallout: Radiation and the Discretionary Function Exception, 22 Envt. L. 1509, 1538 (1992).

Regulators, when appropriate, would respond to the incentive by adopting, rather than avoiding mandatory regulations and policies.

Mandatory duties under regulation and the BLM Manual

BLM Manual, H-8372-1, VIIC (App. 39) provides "Permits *shall* be immediately suspended . . . for violations of . . . permit stipulations providing for the safety or health of the public." [Emphasis added]. This Manual, which speaks in mandatory language, sets the policy of the BLM pursuant to the regulation (43 C.F.R. § 2920.9-3) which requires, again in mandatory language, that "upon a determination that there is noncompliance with the terms and conditions . . . which adversely affects the public health, safety or welfare. . . . " the "authorized officer shall issue an immediate temporary suspension" of a permit. Although there is ample evidence in the record from which a trial court could find that the BLM agents assigned to monitor the event knew or should have known that the permittee was in violation, the Ninth Circuit held that a decision to suspend the permit "would necessarily include a discretionary balancing of policy considerations." (App. 14).

The Ninth Circuit's decision conflicts with the Sixth Circuit's decision in *Myers v. United States*, 17 F.3d 890 (6th Cir. 1994). In *Myers* the plaintiffs sued for the death of coal miners killed in an explosion in a Tennessee mine. The plaintiffs argued that the United States, acting through inspectors of the Mine Safety and Health Administration (MSHA), negligently failed to discover and cite or require the mine owner to correct dangerous situations that contributed to the miners' deaths. Although the Ninth Circuit cited *Myers* as if it supported the Ninth

Circuit's position (App. 13), *Myers* is in clear conflict. *Myers* squarely held that determining whether a violation exists is not a decision based on social, economic or political policy. *Myers*, 17 F.3d at 898.

The *Myers* court first noted that all of the mine inspectors' duties under statutes or regulations were of the "*if, then*" form – e.g., "*if* 'significant and substantial violations' are found, *then* inspectors *must* issue a withdrawal order." *Myers*, 17 F.3d at 893 (emphasis in original). The court first decided that the nature of the inspectors' actions necessitated a choice "sufficient to satisfy the first prong of the *Berkovitz/Gaubert* analysis." *Id.* at 896. The court then, after considering the *Gaubert* presumption in favor of finding a policy-based decision, recognized that "in many cases, the presumption would be rebutted because many acts performed by agency personnel – though they involve a significant degree of choice – are not grounded in regulatory policy and thus are not protected by the discretionary function exception." *Id.* (citing *Gaubert*, 499 U.S. at 325-26 n.7). The mine inspectors were not authorized to make their assessments based on "social, economic or political policy." *Id.* at 897. The court pointed out that

> "the balancing of the interests of the miner and the mine owners, and the consideration of the most effective use of limited MSHA resources has been done, first by congress and then, to a greater degree, by the Secretary of the Department of Labor in promulgating the various safety regulations. The MSHA inspectors whose conduct is at issue in the present case are *not authorized* to reweigh these interests on a case-by-case basis. Rather, they are to determine compliance and, in the event of non-compliance,

issue the mandatory citation and orders." *Id.* at 898 (emphasis in original).[4]

Whatever the subjective intent of the BLM monitors on the scene, they, like the MSHA mine inspectors, do not make social policy for the BLM. "The inquiry must focus on the objective evaluation of the discretion conferred rather than a review of the actor's subjective method of choosing a course of action." *Id.* at 896 (citing *Gaubert*, 499 U.S. at 325-326.) The argument that the inspectors in *Myers* exercised policy judgment "relied too heavily on the presumption in *Gaubert* and failed to demonstrate any consideration of 'political, social, or economic policy.' " *Id.* at 897.

Myers was decided in a regulatory context, a context in which one may expect more deference to government action. The government in the present case is acting as landowner. Thus, even in the absence of regulations setting specific "set standards" (App. 14), the BLM and its agents must act as reasonable, prudent landowners under the circumstances.[5] One would scoff if the private

---

[4] Although the court found the discretionary function exception inapplicable, the plaintiffs' actions ultimately failed because, in part, there was no Tennessee law providing that a private individual would be liable under similar circumstances. *Id.* at 904-05. See fn. 2, *supra*.

[5] Some other circuits seem to agree with *Myers*, and some do not. Compare *Ayala v. United States*, 980 F.2d 1342, 1349-50 (10th Cir. 1992) (inspector's judgments governed by objective principles of electrical engineering, therefore discretionary function exception does *not* apply) with *Estate of Bernaldes v. United States*, 81 F.3d 428 (4th Cir. 1996) (declining to follow *Myers*). *Bernaldes* is criticized in A. Hackman, *Note and Comment: The Discretionary Function Exception to the Federal Tort Claims Act: How Much is Enough?*, 19 Campbell L. Rev. 411 (1997). The

landowner who hosted the 1997 Burning Man event knew or should have known of conditions dangerous to the public and defended his decision to countenance the danger by arguing that he was making "social, economic or political policy." As the Ninth Circuit once said in an opinion closer to the mark:

> "Such a judgment would be no different than the judgment made by a private individual not to take certain measures to ensure the safety of visitors. To interpret such a judgment as discretionary would be too expansive an interpretation of Congress' intent in creating the discretionary function exception." *Faber v. United States*, 56 F.3d 1122, 1125 (9th Cir. 1995).

The simple fact is that the government owes no duty to miners unless it assumes that duty through statute or regulation. As a landowner, however, the government, under the FTCA, owes the same duty as any other landowner even if there are no statutes or regulations evidencing, expounding, or expanding on the duty. It would be perverse to interpret the regulations and Manual in the present case, both of which were drafted to further protect the public and complement this duty, as *limitations* on the government's pre-existing obligation to protect the public.

Duty to Warn

A Nevada landowner would have a duty to warn, or a duty to insure that the promoter warned, fee-paying

---

author states that the Fourth Circuit used *Gaubert* to find public policy considerations where none exist (*Id.* at 432) and as an amnesty from making difficult determinations. *Id.* at 431.

members of the public about the unusual dangers associated with camping at a large event with no traffic control. Moreover, as the hazard increased, an independent duty to warn would arise as the situation became more dangerous. The Ninth Circuit held that any duty to warn, either at the permit granting stage or on the scene at the event, was protected by the discretionary function exception. (App. 10, 11). This holding conflicts with the Tenth Circuit's decision in *Duke v. Department of Agriculture*, 131 F.3d 1407 (10th Cir. 1997) and the approach of other Circuits – including the Ninth Circuit's earlier cases. Although petitioner extensively briefed and argued *Duke* (Appellant's Brief, pp, 14, 19, 20-23, 25, 30, 32, 36), the Ninth Circuit chose completely to ignore the decision in its opinion in this case.

A long line of district and circuit court cases, beginning prior to the *Berkovitz-Varig-Gaubert* trilogy, holds that failure to warn of dangers on federal land is, generally speaking, not the kind of conduct protected by the discretionary function exception. For pre-*Gaubert* cases, see *Lindgren v. United States*, 665 F.2d 978 (9th Cir. 1982) and cases cited therein.

In *Duke, supra*, the Tenth Circuit rejected the government's discretionary function claim in a case strikingly parallel to the present case. The Forest Service and the State of New Mexico had cooperated in the building of a dam and access road. The road, which was a state road, ran through a road cut. One side was designated for parking vehicles. Plaintiff suffered serious brain injury when an unstable boulder fell from the hillside and smashed into his tent while he was camping on the side of the road opposite the parking area. As in the present case, the Forest Service knew that campers used the area

on the side of the road and that falling boulders, like uncontrolled traffic at Burning Man, made the area dangerous to campers. Plaintiff sued, basing his claims on failure to warn or failure to fence this dangerous area.

The court, applying the two prong *Berkovitz-Varig-Gaubert* test, first found that there were no regulations or policies mandating the posting of warnings or the fencing of the area. Thus, the Forest Service employees could exercise "choice" under the applicable manuals and regulations. Indeed, the Forest Service in *Duke* operated under a statutory and regulatory scheme granting discretion similar to that of the BLM in the present case.

> "The Quemado Dam was in a national forest, established for *'outdoor recreation, range, timber, watershed, and wildlife and fish purposes.'* 16 U.S.C. § 528. The Forest Service had *broad discretion* to administer the forests to preserve natural resources for present and future generations. See 16 U.S.C. § 1600(6). 'The Forest Supervisor is responsible for the long range sign programs on the Forest.' Forest Service Manual (FSM) § 7160.43. . . . " *Duke*, 131 F.3d at 1410 n.3, [emphasis added].

In addition to the policies set forth in 16 U.S.C. § 528, above, the manuals also stated various broad policies comparable to the "multiple use" policy applicable to the BLM and the playa. They included "provide safe and healthful facilities for visitors," "long range sign programs," and various other broad policies relating to signage and safety. The *Duke* court found that these manuals, although emphasizing safety and appropriate warnings, left discretion to the employee regarding how to act in particular circumstances. *Duke*, 131 F.3d at 1410.

Nevertheless, the court noted that "not all actions that require choice – actions that are, in one sense, 'discretionary' – are protected as 'discretionary functions' under the FTCA." (Quoting from *Cope v. Scott*, 310 U.S. App. D.C. 144, 45 F.3d 445, 448 (D.C. Cir. 1995). Continuing, the court said:

> "One of the problems, as *Cope* recognized, is that nearly every governmental action is, to some extent, subject to policy analysis – to some argument that it was influenced by economics or the like. An added difficulty is that a failure to act can be a policy decision; and a failure to think about acting may still be 'susceptible to policy analysis' as contemplated by *Gaubert*. 499 U.S. at 324-25. . . . This permits the government to argue, as it appears to do here, that decisions – or nondecisions – that involve choice and any hint of policy concerns are discretionary and within the exception. We agree with the D.C. Circuit that 'this approach . . . would not only eviscerate the second step of the analysis set out in *Berkovitz* and *Gaubert*, but it would allow the exception to swallow the FTCA's sweeping waiver of sovereign immunity.' *Cope*, 45 F.3d at 449." *Id.* at 1410.

The court distinguished several cases where the public policy supporting the decision was readily identifiable – for example, the desire in national parks to leave the land in its pristine, natural or scenic condition, combined with the impracticability of warning against known and unknown hazards of the wilderness. The court then noted with approval cases upholding liability where the court could not perceive in the record before it

> "any *significant* social, economic or political policy in the action or inaction that allegedly contributed to the injury giving rise to the lawsuit.

> E.g., *Boyd v. United States*, 881 F.2d 895 (10th Cir. 1989) (Army Corp of Engineers' 'failure to warn swimmers of dangerous conditions in a popular swimming area does not implicate any social, economic, or political policy judgments with which the discretionary function exception is properly concerned'); *Smith v. United States*, 546 F.2d 872, 876-77 (10th Cir. 1976) (failure to warn of the hazards of thermal pool in national park); *Gotha*, 115 F.3d at 181-82 (failure to provide safeguards on a footpath on a Navy underwater tracking range); *Cope*, 45 F.3d at 451-52 (failure to post adequate warning signs on road maintained by the National Park Service). In these cases a specific hazard existed, distinct from the multitude of hazards that might exist in, for example, a wilderness trail through a national park or forest, where warnings might detract from the area's character or safety structures might be costly." *Id.* at 1411. [emphasis added].

The *Duke* court's reference to the *Boyd* case is especially compelling. Campers in tents on a dry lake bottom are every bit as vulnerable to cars as swimmers on the surface are to power boats. See also, *George v. United States*, 735 F. Supp. 1524 (M.D. Ala. 1990) (failure to warn swimmers at a designated swimming area of a known dangerous alligator). The *George* court stated:

> "[S]urely, it cannot be contended that the forest officials had discretion to decide whether overriding policy considerations of protecting the alligator(s) and the natural state of the area outweighed the safety of humans using the designated swimming area." *Id.* at 1531.

See also, *McMurray v. United States*, 918 F.2d 834 (9th Cir. 1990) (failure of government to warn of extreme temperature at hot springs on federal land in Nevada –

failure to warn characterized as "willful" under Nevada law).

Noting that a warning sign or a sign prohibiting camping at the site because of the danger would cost little, and that, in any event, "insufficient government resources alone do not a discretionary function make" (citing *Domme v. United States*, 61 F.3d 787, 793 (10th Cir. 1995) (Henry, J., concurring) the *Duke* court rejected the government's claim that the decision not to warn was a policy decision that furthered the Forest Service objective of "resource allocation, forest management, and preserving a natural state of appearance of the Gila National Forest." *Id.* at p. 1411. The court reversed the trial judge's grant of summary judgment.

Even earlier Ninth Circuit jurisprudence seemed to agree with the approach of *Duke*, *Boyd*, and *George*. Safety decisions, such as the decision not to warn, are seldom of the protected class. They involved

> "considerations of safety, not public policy. It would be wrong to apply the discretionary function exception in a case where a low-level government employee made a judgment not to post a warning sign, or to erect a guardrail, or to make a safer path. Such a judgment would be no different than the judgment made by a private individual not to take certain measures to ensure the safety of visitors. To interpret such a judgment as discretionary would be too expansive an interpretation of Congress' intent in creating the discretionary function exception. Therefore, in cases where the government has allegedly failed to warn, the use of the discretionary function exception must be limited to those *unusual* situations where the government was required to engage in broad, policy-making

> activities or to consider *unique* social, economic, and political circumstances in the course of making judgments related to safety." *Faber v. United States*, 56 F.3d 1122, 1125 (9th Cir. 1995). [Emphasis added]. See also *Lesoeur v. United States*, 21 F.3d 965 (9th Cir. 1994) (in "usual" cases failure to warn implicates only safety concerns, not political policy – *Lesoeur*, however, was "not usual" in that tribal self-determination was implicated).

Like *Duke*, in its opinion the Ninth Circuit also ignored *Boyd* and *George*, *supra*.

Approval of Burning Man's site-plan mixing cars and campers

Objective site-planning standards require the separation of cars and campers at an event such as Burning Man. ER Tab 73, Ex. M & N (Affidavits of Engineer Presswood and Safety Engineer Jennings). Any private landowner that chose not to separate cars and campers would be subject to a claim for injuries caused by failure to do so. This would be considered "garden-variety" negligence on the part of the landowner. Indeed, the private landowner who hosted the event in the following year (1997), and the government at all subsequent Burning Man events held on federal land have separated cars and campers.

Nevertheless, the Ninth Circuit held that failure to follow this objective, event planning standard, because it included choice, was protected by the discretionary function exception. The Ninth Circuit so held despite the absence from the record of any evidence (other than a speculation in the government's brief (Gov. Brief. p. 24) as to the convenience of parking cars next to camp sites –

a matter equally applicable to the event if held on private land) that this decision was informed by social, political or economic policy. The Ninth Circuit's view was that discretion to grant a permit carried with it discretion to grant it on any terms whatsoever.

The Ninth Circuit erred. Its decision conflicts both with this Court's precedents and with the Third Circuit's decision in *Gotha v. United States*, 115 F.3d 176, 181-82 (3rd Cir. 1997).

In *Gotha*, the Third Circuit rejected expansive claims by the Navy that failure to take appropriate safety measures on a military base was "policy" based:

> "This case is not about a national security concern, but rather a mundane, administrative, *garden-variety*, housekeeping problem that is about as far removed from the policies applicable to the Navy's mission as it is possible to get. In the words of the Supreme Court, the "challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime." *Gaubert*, 499 U.S. at 325. It is difficult to conceive of a case more likely to have been within the contemplation of Congress when it abrogated sovereign immunity than the one before us." *Gotha*, 115 F.3d at 181-82. [Emphasis added].

Petitioner cited *Gotha* to the Court and pointed out that the BLM's act in granting a permit without separating cars and campers was "garden-variety" negligence. Again, without citation to *Gotha*, the Ninth Circuit rejected *Gotha* and its rationale with the statement,

> "No degrees of negligence are involved. There was one discretionary license issued for this event, and what its terms were and how those

terms might be enforced were all discretionary." (App. 11)

As this court explained in *Gaubert*, the issue turns on the "kind of conduct" and the "nature of the actions taken," not on the level the decision is taken. *Gaubert*, 499 U.S., at 324-25. Although the regulation vests the BLM with discretion whether or not to grant the permit, it does not follow that every aspect of the permit is vested with social, economic or political policy. Some will – such as the weighing of environmental concerns or the judgment whether an event of this nature should be hosted on federal land – and some will not. See, e.g., *Caplan v. United States*, 877 F.2d 1314 (6th Cir. 1989) (decision to deforest part of government's land was grounded in policy, but decision not to warn contractor of the danger from unstable dead trees involved only ordinary principles of safety and, therefore, plaintiff's claims were not barred). Mixing dangerous cars and vulnerable campers, somewhat like a gladiatorial event with cars as lions and campers as Christians, falls into the latter category. Nothing in the regulatory scheme addresses this question, therefore nothing suggests that the BLM may ignore objective site-planning standards.

As this Court pointed out in *Berkovitz*, decisions informed by objective standards do not fall within the discretionary function exception. *Berkovitz*, 486 U.S, at 545 (exception does not apply to decision involving "the application of objective scientific standards"). See also, e.g., *Ayala v. United States*, 980 F.2d 1342, 1349-50 (wiring of safety lights in mine "governed solely by technical considerations" and not by policy factors); *Andrulonis v. United States*, 952 F.2d 652, 655 (2d Cir. 1991) (failure to warn of dangers involved in rabies experiment not a

protected policy decision); *Sexton v. United States*, 797 F. Supp. 1292, 1301 (E.D.N.C. 1991) (negligent design of metal grate not discretionary function); *Mayer v. United States*, 774 F. Supp. 1114, 1118-19 (N.D. Ill. 1991) (release of paranoid schizophrenic not protected). It is not that these decisions involve no discretion – indeed, they often involve significant choices – but that they are not decisions based on political policy any more than the Nevada rancher hosting the event would be making a political decision in either mixing or separating cars and campers.

There is nothing in the history of the FTCA to suggest that all discretionary decisions are political ones. As this Court recognized in *Gaubert*, federal drivers exercise discretion, yet negligent driving is not a protected activity. *Gaubert*, 499 U.S., at 325 n.7.

Moreover, when put in the context of a private promoter using federal land for a commercial event, it is unlikely that Congress expected the FTCA indirectly to subsidize private, commercial activity. Unfortunately, the Ninth Circuit's decision has that effect. It is unlikely that any private landowner would allow Mr. Harvey, the promoter, to hold this event without either separating cars and campers, purchasing enough insurance to cover the landowner for the hazard, or both. When Mr. Harvey steps across the line onto federal land, the landowner's responsibility, under the Ninth Circuit's opinion, becomes irrelevant. Thus, the Burning Man event may go forward with only Mr. Harvey's liability and assets, if any, as the only serious deterrent. If the promoter is impecunious (as many promoters are) or can hide behind a corporate shell, the discretionary function exception to the FTCA has allowed this private party to hold a dangerous, commercial event without facing the reality of internalizing

the costs of the unreasonable risks his event creates.[6] Scholars have noted how sovereign immunity creates a danger of "misallocation between the public and private sectors." Laul Levmore, *Takings, Torts, and Special Interests*, 77 Va. L. Rev. 1333, 1351 (1991).

In sum, the current "susceptible to policy analysis, *ergo* policy based" approach leads – as it did in the present case – to the conclusion that almost any choice is protected discretion. This is inconsistent with Congress' broad waiver of immunity in the FTCA, and it has led to conflicts among the Circuits. For example, the Ninth Circuit's decision in the present case conflicts with *Duke*, *Mayer* and *Gotha*, *supra*. The current situation also puts inappropriate pressure on administrators to avoid mandatory rules, even if they are in the public interest, and to couch all agency action in discretionary terms. In effect, this allows them administratively to opt-out of the FTCA – again, hardly what Congress had in mind. The current rule is also inefficient. The government's immunity indirectly subsidizes irresponsible promoters, such as the promoter of Burning Man. One can also suspect that the current lack of predictability encourages district court judges, mindful of wasting scarce trial resources, to grant summary judgment and try only those cases sent back to them by the circuit courts – another inefficient outcome.

---

[6] Applicable regulations mandate that the BLM require Burning Man to carry insurance and to name the United States as an additional insured. 43 C.F.R. § 8372.5(d). This regulation surely suggests the BLM contemplated liability for its negligence. The BLM merely required a policy for this event of $100,000. In its post-event review, it recommended raising the limit to 5 or 10 million dollars. ER, Tab 60, Ex. A at 2225.

The present case is an appropriate one in which to resolve these conflicts and restore the appropriate balance between the FTCA and the discretionary function exception.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT W. PETERSON
Counsel of Record
SHEA & SHEA
A PROFESSIONAL LAW CORPORATION
255 North Market Street
Suite 190
San Jose, CA 95110
(408) 292-2434

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL REED, by and through his conservator, JOLAINE ALLEN,

Plaintiffs-Appellants,

and

PERSHING COUNTY; PERSHING CO. SHERIFF; WASHOE COUNTY; WASHOE COUNTY SHERIFF; AVIS RENT-A-CAR; LARRY DEAN HUDSON; LARRY DEAN MEYER; LARRY D. HARVEY, Individually dba: Burning Man Project; JOHN LAW, Individually dba: Burning Man Project; dba: Burning Man; MICHAEL MIKEL, Individually dba: Burning Man Project; dba: Burning Man; FELLINI, CRONENBURG AND DANTE; BLACK ROCK SECURITY GROUP; BLACK ROCK RANGERS,

Defendants,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, Bureau of Land Management,

Defendant-Appellee.

No. 99-15250

D.C. No. CV-97-20760 SW

OPINION

Appeal from the United States District Court
for the Northern District of California
Spencer Williams, District Judge, Presiding

Argued and Submitted
May 3, 2000 – San Francisco, California

Filed November 2, 2000

Before: Harlington Wood, Jr.,[1]
Andrew J. Kleinfeld, and
Susan P. Graber, Circuit Judges.

Opinion: by Judge Wood

COUNSEL

Michael M. Shea, Shea & Shea, San Jose, California, for plaintiff/appellant Daniel Reed, by and through his Conservator, Jolaine Allen.

Robert S. Mueller, III, and Gail Killefer and Yonkel Goldstein, United States Attorney's Office, San Jose, California, for defendant-appellee United States of America.

OPINION

WOOD, Circuit Judge:

Plaintiff-appellant Daniel Reed was severely injured in the early morning hours of September 2, 1996, when a car ran over the tent in which he was sleeping. At the time of the accident, Reed was attending an event known as the Burning Man Festival, which was held on the

---

[1] The Honorable Harlington Wood, Jr., United States Circuit Judge for the Seventh Circuit, sitting by designation.

desolate Black Rock Desert playa[2] in Nevada. The playa is federally owned land managed by the Bureau of Land Management ("BLM"). Reed filed suit under the Federal Tort Claims Act, 28 U.S.C. §§ 2679-2680 ("FTCA"), against the United States to recover damages for his injuries. The United States moved for summary judgment, asserting that the suit was barred by the discretionary function exception to the FTCA, 28 U.S.C. § 2680(a). The district court granted summary judgment in favor of the United States, ruling that all the allegedly negligent conduct of the government was shielded by the discretionary function exception of the FTCA, leaving the court without subject matter jurisdiction. Reed appeals. We review *de novo*. *Miller v. United States*, 163 F.3d 591, 593 (9th Cir. 1998).

It may be helpful in viewing plaintiff's injuries in context to explain the Burning Man event. According to its promoters, the event began on a beach in San Francisco in 1986, but in 1990 was moved to the "vast and oceanic space" of the Black Rock Desert of Nevada near Gerlach.[3] The San Francisco Examiner described the event as "based loosely on European pagan straw man festivals at which people gather to erect and burn a large human effigy as dedication to the earth's fertility."[4] The

---

[2] A playa is "the flat-floored bottom of an undrained desert basin that becomes at times a shallow lake which on evaporation may leave a deposit of salt or gypsum." WEBSTER'S THIRD NEW INT'L DICTIONARY 1737 (1981).

[3] *See Building Burning Man*, THE JOURNAL OF THE BURNING MAN PROJECT, SPRING 1997, at 1.

[4] Michael Dugan, *"Guerilla artists" [sic] blast away*, SAN FRANCISCO EXAM'R, Oct. 10, 1995, at A3.

Journal of the Burning Man describes the event as "ritualistic . . . anarchic . . . primal . . . a radical communal experiment . . . art . . . the death of art . . . dreamlike . . . surreal . . . creative . . . destructive . . . absurd . . . spiritual" and "real." The Journal tells us:

> Think of Burning Man as Disneyland turned inside out. But unlike an escapist fantasy produced by others, Burning Man is not vicarious. At Burning Man *you* are the fantasy. People do not come to this event to be distracted from themselves, they come here to discover and distill what they uniquely are. We will not tell you what it means, for Burning Man is based on your immediate experience.

(Emphasis in original.) The Journal advises attendees to "[c]ome prepared to camp here and confront your own survival." In answer to the question, "What is Burning Man?", the Journal states, "It's what you make it." Participants enter the event through the "Gate of Hell" on which is inscribed the admonition, "ABANDON HOPE YOU WHO ENTER HERE."[5] The Burning Man 1996 Survival Guide handout warns: "All participants must take personal responsibility for their own survival, safety and comfort" and cautions participants to bring common sense as "the desert is notoriously unkind to fools." The Survival Guide also warns that "[t]here are no roads, signs or street lights" on the playa. The Pershing County

---

[5] Burning Man 1996 *Events & Attractions* handout.

Sheriff's Office issued a report on the 1996 festival, estimating that participants numbered approximately 7,000, with an additional 3,000 to 4,000 onlookers.[6]

Reed, age 21, from Campbell, California, was attracted to the event for his own reasons. He apparently was accompanied by a friend from Santa Rosa, California (who was also injured but is not involved in this litigation). Reed pitched his tent near a few other tents on the playa several miles from the main camp. September 1, 1996, appears to be the day the event concluded, although the following day was designated as "clean-up day." Early on the morning of September 2, the car of another attendee, traveling across the playa, ran over Reed in his tent. Reed alleges that he suffered severe, permanent brain damage and was left permanently disabled. This action resulted.

---

[6] TIME magazine published an article with pictures of the most recent burning man event. Joel Stein, *The Man Behind Burning Man*, TIME, Sept. 18, 2000, at 76. the event was referred to as a "punk-pagan celebration." *Id.* Two readers responded to the article in the "letters to the editor" column in a following issue. *Letters*, TIME, Oct. 9, 2000, at 20, 22. One respondent had recently worked with Indians in Nevada and took exception to the "pagan" reference, stating that "the puerile horde that invades the desert on Labor Day has no clue about the earth or true spirituality." The other reader wrote that he had attended the festival for the first time this year. He characterized it as "an example of how everyone should live." This court passes no judgment on the event.

ANALYSIS

The district judge carefully analyzed the legal situation and, on December 10, 1998, granted the government's motion for summary judgment due to the fact that, under the applicable statutes, the district court lacked subject matter jurisdiction. We agree.

The United States can be sued only to the extent that it has waived its sovereign immunity. *Blackburn v. United States*, 100 F.3d 1426, 1429 (9th Cir. 1999). The FTCA, however, "waives the Government's sovereign immunity for tort claims arising out of the negligent conduct of government employees acting within the scope of their employment." *Id.* (citation omitted). Consequently, the government can be sued and may be liable "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). However, that waiver of immunity is then limited by the "discretionary function" exception, 28 U.S.C. § 2680(a), which is applicable to this case.

The discretionary function exception limits the FTCA's otherwise broad waiver of sovereign immunity, stating that the provisions of the FTCA shall not apply to claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). In *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813-14 (1984), the Supreme Court established a

two-part test for use in determining whether the discretionary function exception applies. *See also Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988). First, a court must determine whether the challenged action involves an element of choice or judgment. *Varig Airlines*, 467 U.S. at 813. If it does, then secondly, the court must decide "whether that judgment is of the kind that the discretionary function exception was designed to shield," which "protects only governmental actions and decisions based on considerations of public policy." *Berkovitz*, 486 U.S. at 536-37 (citation omitted). If both tests are satisfied, the discretionary function exception applies, leaving the court without subject matter jurisdiction. *Sigman v. United States*, 217 F.3d 785, 793 (9th Cir. 2000). The United States bears the burden of proving that the exception applies. *See id.*

Reed contends that the following four actions by the BLM fall outside the scope of the discretionary function exception: (1) failing to warn, or to require Burning Man organizers to warn, of the hazard of camping in an area subject to unrestricted night-time vehicular travel; (2) approving a site plan that failed to segregate cars from tents; (3) failing to monitor the event as prescribed by regulation and policy; and (4) failing to suspend the permit once public safety was in jeopardy.

With respect to the first two challenged actions, the first prong of the discretionary function test clearly is met. The BLM was granted discretion to determine whether to issue the permit or not and, if issued, to decide the restrictions to be applied. The agency is given specific authority to include in a recreation permit "such stipulations as the authorized officer considers necessary

to protect the lands and resources involved and the public interest in general." 43 C.F.R. § 8372.5(b). As a practical matter, it could be no other way than by the exercise of discretion. No federal statute, regulation, or policy requires a particular course of action. *See United States v. Gaubert*, 499 U.S. 315, 322 (1991). Even if the permit had been granted without any conscious policy decision (contrary to the facts of this case), the discretionary exception function would still apply. *See Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1028 (9th Cir. 1989); *Myslakowski v. United States*, 806 F.2d 94, 97-98 (6th Cir. 1986). The BLM, in its exercise of discretion, balanced competing public policy concerns, including concerns about public access, safety, resource allocation, and the environment, as allowed under both *Gaubert* and *Varig*. *Gaubert*, 499 U.S. at 324; *Varig*, 467 U.S. at 820.

The record reveals that the government exercised its discretion in granting Burning Man the event permit. Even if the exercise of that governmental discretion was ill-advised, it does not make the discretionary function exception inapplicable. Even if the particular provisions included in the permit itself were not well-conceived or sufficient, that exercise of discretion is also beyond Reed's reach. After the BLM received the event application from Larry Harvey, Burning Man's promoter, the agency began its preliminary process of review. It sent out letters to interested parties in compliance with the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 ("NEPA"), seeking comments related to the proposed event. The comments received expressed concerns about safety, morality, and the environmental impact of the event. Following consideration of those

comments, the BLM prepared an Environmental Assessment, which considered the possible impact of the event on the environment, but found that there would be no significant environmental impact. It noted that the area to be used was believed to be one of the largest, flattest dry lake beds in the world.[7] In its judgment, BLM considered that the Burning Man event had had no prior significant safety problems from 1992 through 1995. Even though the event was growing in size each year, the record shows that it also had a good compliance record with BLM licensing requirements. As part of the process, the promoters were required to submit a "site plan" with some indication of the physical layout for the event, bearing in mind the openness, vastness, and flatness of the area. The BLM reviewed the site plan submitted and, in its discretion, considered it adequate for the short-term recreational event.

The BLM also considered Congressional directives, as stated in the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784 ("FLPMA"), to manage the land for multiple uses in a manner that would help meet the present and future needs of the citizens, including recreational uses. 43 U.S.C. §§ 1732(a), 1701(a)(2), (7), 1702(c). According to a BLM district manager, the government land use plan in effect at the time Burning Man applied for its 1996 permit dictated that "as many recreational opportunities as possible" be provided, "without undue environmental degradation." And, of course,

---

[7] According to the BLM district manager during the period of these events, because the playa was so vast and flat, the area had been used in 1981 and 1997 to set new land speed records.

under the Constitution's First Amendment, the agency's discretion could not be used to abridge the legitimate rights of expression or association of the participants. The BLM was aware that many event participants pursued and encouraged an "alternative lifestyle," but it believed that the actions taken in the exercise of its discretion should not be affected by the personal philosophies of the participants. The BLM believed that the proposed policing strategies would be sufficient to handle any illegal activity that might occur. According to the record, there had been some use of alcohol and illegal drugs in the past but, in the BLM's judgment, there had been no serious problems. The provisions for policing were expected to be adequate. The BLM also took into consideration planned coordination with local law enforcement officials, in addition to the event's own acceptance of responsibility for the safety of its participants. There is no need to further explore all the details involved in the BLM's exercise of its discretion. Some would disagree with the manner of the agency's exercise of its discretion, but that is irrelevant.

Reed argues that, even though the BLM may have had discretion to issue the permit, "the decision to approve an event involving thousands of campers and cars without segregating them, or requiring Burning Man to do so, was not the kind protected by the discretionary jurisdiction exception, it violated standard, elementary objective, technical standards for events of this size." Reed is mistaken. This issue is the type of judgment the discretionary function exception was designed to shield. *Gaubert*, 499 U.S. at 323. In his brief, Reed maintains:

> The failure to warn campers, and the failure to require Burning Man to warn campers, is not protected by the discretionary function. This failure is "garden-variety" negligence which does not implicate significant, unusual or unique social, economic, and political considerations. As the event doubled its expected size and the BLM's agents became aware of the increased danger to the safety of the participants, their failure to warn campers, or failure to ask Burning Man to warn (or separate cars and campers) was not of the type protected by the discretionary function exception. Moreover, the BLM failed in its mandatory duty to both monitor the event and protect the public by temporarily suspending the permit while taking appropriate remedial action.

Reed's arguments do not overcome the presence of a discretionary function. No degrees of negligence are involved. There was one discretionary license issued for this event, and what its terms were and how those terms might be enforced were all discretionary. Reed's own argument shows the need for agency discretion. He disagrees with the way discretion was exercised, but the discretionary function exception makes that objection irrelevant.

Reed next argues that the BLM was required by regulation and policy to monitor the event and that its failure to do so falls outside the discretionary function exception. Under 43 C.F.R. § 2920.9-2, the BLM was required to "inspect and monitor . . . to assure compliance with the plan of management and protection of the resources, the environment and the public health, safety and welfare." Although Reed asserts that BLM agents

chose not to monitor the event, in fact, they did monitor it. Rather, his real argument is that, because the agents left the site by 10:00 p.m. each evening, the agents failed to monitor in a reasonable manner. However, as was the case in *Childers v. United States*, 40 F.3d 973, 976 (9th Cir. 1994), the discretionary decisions made as to the precise *manner* in which the BLM should monitor events also fall within the exception. *See also Blackburn*, 100 F.3d at 1431. No regulation required twenty-four hour monitoring; in fact, the BLM Manual H-8372-1-Special Recreation Permit for Commercial Use, VIIA, states that the amount of monitoring should be "commensurate with the resource values at risk, the permittee's past record of compliance, the ability to obtain monitoring services through other means such as local police, other permittees, the public, and other factors." The decision as to the nature and extent of monitoring clearly involves both discretion on the part of BLM employees and a balancing of public policy concerns.

Finally, Reed contends the BLM had a duty to suspend the permit once public safety was in jeopardy, but failed to do so. Under 43 C.F.R. § 2920.9-3,

> (a) Land use authorizations may be terminated under the following circumstances:
>
> . . . .
>
> (2) Noncompliance with applicable law, regulations or terms and conditions of the land use authorization.
>
> . . . .
>
> (b)(1) Upon determination that there is noncompliance with the terms and conditions of a

> land use authorization which adversely affects the public health, safety or welfare or the environment, the authorized officer shall issue an immediate temporary suspension.[8]

The BLM Manual, H-8372-1, VIIC, provides: "Permits shall be immediately suspended, and other appropriate penalties imposed, for violations of Federal, State, or local laws, regulations, or permit stipulations providing for the safety or health of the public." Reed contends that Burning Man organizers violated their permit obligation to protect the safety of the public and, therefore, the BLM was obligated to suspend the permit. Although Reed asserts, without citation to the record, that "the BLM knew that Burning Man had created a situation violating their permit obligation to protect the safety of the public," there is no evidence in the record that, during the course of the 1996 festival, the BLM determined a permit violation affecting the public health or safety had occurred. In his reply brief, Reed concedes that the determination as to whether a violation affects public health or safety implies choice, *Myers v. United States*, 17 F.3d 890, 895-96 (6th Cir. 1994), but argues that the determination made by "line-level employees at the event" does not

---

[8] Reed also cites to 40 C.F.R. § 8372, which governs "Special Recreation permits Other Than On Developed Recreation Sites." Subsection 8372.5(a)(1) provides: "The authorized officer may suspend a special recreation permit if necessary to protect public health, public safety, or the environment." Although the parties were unable to state whether 43 C.F.R. § 2920.9-3 or 43 C.F.R. § 8372.5 governed the Burning Man permit, we need not determine the issue because, even assuming the more stringent § 2920.9-3 applies, we conclude that the BLM maintained discretion.

implicate public policy concerns. However, nothing specifies which agency employees may or may not exercise discretion. Both the regulations and the BLM Manual require not only a finding of a violation, but also a finding that the violation affects public health or safety. There were no set standards in place outlining what types of permit violations would be sufficient to justify permit suspension; the BLM Manual, H-8372-1, VIIC, states only that "[a]n example could be the lack of a required local license for food service." The decision to suspend the permit would necessarily include a discretionary balancing of policy considerations. *National Union Fire Ins. v. United States,* 115 F.3d 1415, 1421 (9th Cir. 1997). Therefore, again, the discretionary function exception applies.

Reed cites a number of cases, including *Faber v. United States,* 56 F.3d 1122 (9th Cir. 1995), and *Routh v. United States,* 941 F.2d 853 (9th Cir. 1991), to illustrate why the discretionary function exception should not be extended to the present circumstances. Those cases are inapposite because they involve allegations of isolated instances of negligence that were not policy-based, as were the discretionary decisions in this case. *See Faber,* 56 F.3d at 1127; *Routh,* 941 F.2d at 857. Reed also cites *Appley Bros. v. United States,* 164 F.3d 1164 (8th Cir. 1999), to show that the BLM violated its duty. However, in Appley, the government regulation mandated a particular government action. *Id.* at 1173. In the present case, the regulation does not mandate any particular act which the government failed to perform. Possible suspension of the permit was left to the discretion of the agency. In its exercise of discretion, the BLM also considered that revocation of the license in the circumstances of this event, with so many

people spread over a wide area, would likely cause confusion and serious dangers.

Reed cites *Seyler v. United States*, 832 F.2d 120, 122-23 (9th Cir. 1987), in arguing that the failure to provide warning signs is not a policy-based decision. *Seyler* is distinguishable from the present case. The panel in *Seyler* noted: "We can find nothing in the record to suggest that the BIA's failure to provide signs resulted from a decision 'grounded in social, economic or political policy.' " *Id.* at 123 (quoting *Varig Airlines*, 467 U.S. at 814). Therefore, because the record was "clearly insufficient for entry of summary judgment on the discretionary function issue," the panel reversed the district court's order, which had held that the discretionary function exception applied. *Id.* The more recent case of *Valdez v. United States*, 56 F.3d 1177, 1180 (9th Cir. 1995), which held that the failure to post warning signs can be protected under the discretionary function exception, is more closely on point. In *Valdez*, this circuit held that, where policy guidelines outline general policy goals regarding visitor safety, "the means by which [government] employees meet these goals necessarily involves an exercise of discretion." *Id.* It is immaterial in the present case whether the license was or was not a lease, whether the landowner owed a duty to invitees under the common law, or whether Nevada law might characterize the BLM's actions as willful. These and other arguments of plaintiff are irrelevant to the legal issues involved.

This was a tragic accident. However, under the circumstances, the government is not liable for any of Reed's damages.

The district court's grant of summary judgment in favor [sic] the United States is AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DANIEL REED, Plaintiff, v. AVIS RENT-A-CAR, et al., Defendants.	CIVIL NO. 97-20760 SW ORDER GRANTING DEFENDANT UNITED STATES' MOTION FOR SUMMARY JUDGMENT (Filed Dec. 10, 1998)

Plaintiff Daniel Reed ("Reed") brought this action against a number of defendants alleging that their negligence resulted in injuries he suffered when a car ran over the tent in which he was sleeping. Among the defendants Reed named in the complaint is the United States Department of the Interior, Bureau of Land Management (the "BLM"),[1] sued under the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.* ("FTCA"). The United States now moves for summary judgment on the grounds that the Court lacks subject matter jurisdiction over the action under the discretionary function exception ("DFE") to the FTCA, 28 U.S.C. § 2680(a). For the reasons set forth below, the Court GRANTS the United States' motion.

I. BACKGROUND

Each year from 1992 to 1996, organizers of an event

[1] The proper federal defendant in this tort action is the United States, which should be substituted for the Bureau of Land Management pursuant to 28 U.S.C. § 2679.

known as Burning Man applied for and received a special recreation permit from the BLM. The permit allowed Burning Man organizers and participants to enter and use certain federally-owned land for their performance arts festival. The event usually lasted several days. In 1996, the five-day Burning Man event was held in the Black Rock desert playa of Nevada, an extremely remote area which consists of little more than vast stretches of sun-hardened silt.

Reed attended the 1996 Burning Man festival where he slept in a tent. During the early hours of September 2, 1996, Larry Dean Hudson drove over Reed while he slept, causing Reed severe injuries. Reed alleges that Hudson was under the influence of drugs and/or alcohol at the time of the accident.

According to Reed, the BLM was negligent when it issued a permit to the organizers of the Burning Man event. Reed further alleges that the BLM was negligent when it later failed to enforce or suspend the permit, failed to warn campers of the danger posed by reckless drivers, and failed to enforce applicable local, state, and federal laws, all of which he asserts would have prevented the type of behavior that caused his injuries.

The United States claims that all actions of BLM employees alleged by Reed to be negligent fall within the discretionary function exception to the FTCA. Therefore, according to the United States, this Court lacks subject matter jurisdiction over the claims against the federal defendant.

II. LEGAL STANDARD

An action can be brought by a party against the United States only to the extent that the Federal Government waives its sovereign immunity. *See Blackburn v. United States*, 100 F.3d 1426, 1429 (9th Cir. 1996). The FTCA waives the Government's sovereign immunity for tort claims arising out of the negligent conduct of government employees acting within the scope of their employment. *See id.* Thus, the Government can be sued "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b).

The FTCA's waiver of immunity is limited, however, by the discretionary function exception, which bars claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). This exception "restores the government's immunity in situations where its employees are carrying out governmental or 'regulatory' duties." *Faber v. United States*, 56 F.3d 1122, 1124 (9th Cir. 1995) (citations omitted). Although application of the exception may be troubling when it acts as a shield for carelessness and poor judgment, "[t]he sovereign has, by the exercise of its authority, reserved to itself the right to act without liability for misjudgment and carelessness in the formulation of policy." *National Union Fire Ins. v. United States*, 115 F.3d 1415, 1422 (9th Cir. 1997).

To determine whether challenged conduct falls within the discretionary function exception, the court must employ a two-step analysis. First, the court must determine "whether the challenged actions involve 'an element of judgment or choice.' " *Valdez v. United States*, 56 F.3d 1177, 1179 (9th Cir. 1995) (quoting *United States v. Gaubert*, 499 U.S. 315, 322 (1991)). "This requirement of judgment or choice is not satisfied if a federal statute, regulation, or policy requires a particular course of action." *Gager v. United States*, 149 F.3d 918, 919 (9th Cir. 1998) (citing *Gaubert*, 499 U.S. at 322; *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)). If a particular course of action is required, the inquiry is at an end and the discretionary function exception does not apply because "the employee has no rightful option but to adhere to the directive." *Id.*

However, if an element of choice or judgment is involved, the court must move on to the second step of the analysis and determine "whether that judgment is of the kind that the discretionary function exception was designed to shield." *Gaubert*, 499 U.S. at 322-23. The exception "protects only governmental actions and decisions based on considerations of public policy." *Id.* at 323. In other words, decisions "grounded in social, economic, and political policy" will be protected by the discretionary function exception. *Childers v. United States*, 40 F.3d 973, 974 (9th Cir. 1994). Throughout the Court's analysis, "the United States bears the ultimate burden of proving the applicability of the discretionary function exception." *Faber*, 56 F.3d at 1124 (quoting *Prescott v. United States*, 973 F.2d 696, 701-2 (9th Cir. 1992)).

III. DISCUSSION

Reed argues that the following BLM actions do not fall within the discretionary function exception: (1) issuing the permit; (2) not enforcing or suspending the permit during the event; (3) failing to warn campers of the danger posed by reckless drivers during the event; and (4) failing to enforce applicable local, state and federal laws during the event. As explained below, the Court concludes that each action of the BLM involved an element of judgment or choice, and that the judgment or choice is of the kind that the discretionary function exception was designed to shield. Accordingly, the Court lacks subject matter jurisdiction over Reed's claims against the United States.

A. Permit Issuance

The United States argues that the BLM's act of issuing the 1996 permit falls within the discretionary function exception. Reed argues that the BLM knew of problems encountered at the 1995 event which should have either resulted in more stringent conditions on the 1996 permit or precluded its issuance entirely. In support of his argument, Reed provides an extensive list of incidents which occurred during the 1995 Burning Man which he claims should have alerted the BLM to the potential problems associated with issuing a permit in 1996. In addition, Reed submitted evidence that various organizations filed with the BLM written objections opposing the issuance of the 1996 permit.

Significantly, Reed's evidence and argument focus on the BLM's alleged negligence. However, "negligence is simply irrelevant to the discretionary function inquiry." *Kennewick Irrigation District v. United States*, 880 F.2d 1018, 1029 (9th Cir. 1989). For the most part, Reed fails to address the questions of whether the BLM had discretion to issue the permit and, if so, whether its decision involved questions of public policy. Those are the only relevant questions for purposes of this motion.

The BLM had discretion to issue the permit. Consistent with "principles of multiple use and sustained yield," Congress authorized the Secretary of the Interior to issue regulations providing for the use of public lands. 43 U.S.C. § 1732(a); *see also* 43 U.S.C. §§ 1733 and 1740. Regulations promulgated pursuant to this delegation of authority provide that "[t]he approval of an application and subsequent issuance of a special recreation permit is discretionary with the authorized officer." 43 C.F.R. § 8372.3. Furthermore, "[a] special recreation permit will contain such stipulations as the authorized officer considers necessary to protect the lands and resources involved and the public interest in general." 43 C.F.R. § 8372.5(b).

These regulations clearly indicate that the decision to issue a special recreation permit – and what stipulations to attach to that permit – are discretionary with the BLM, and that the BLM's decision is based on considerations of public policy. Issuance of a permit involves a balancing of the principles of providing recreation, utilizing resources, protecting the environment, and safeguarding the public interest in general. The BLM's decision to issue a permit to the organizers of Burning Man 1996, and its decision

regarding what conditions to attach to that permit, fall within the discretionary function exception to the FTCA. Reed's claim regarding the BLM's negligence in issuing a special recreation permit is therefore barred.

B. Enforcing/Suspending the Permit

Reed next argues that the BLM's failure to enforce or suspend the permit during the 1996 Burning Man event falls outside the discretionary function exception. As a prelude to this argument, Reed contends that the BLM had a duty to monitor the event. Once the BLM discovered that the behavior of Burning Man participants had resulted in a dangerous situation, Reed argues that it was negligent when it did not suspend the permit or enforce the conditions and stipulations of the permit.

The BLM Manual dated September 9, 1987 (the "Manual") states that "[p]ermits are monitored for compliance with stipulations, terms and conditions." BLM Manual at VII-1. The amount of monitoring, however, is left to the BLM's discretion, and should be "commensurate with the resource values at risk, the permittee's past record of compliance, the ability to obtain monitoring services through other means . . . and other factors." *Id.*

The parties agree that the BLM had officers present for the purpose of monitoring the 1996 Burning Man event. The decision regarding how much to monitor the event was expressly left to the judgment of the BLM, upon consideration of public policy. That decision is therefore protected by the discretionary function exception.

The next step in Reed's argument is that the Manual imposed a mandatory duty on the BLM to suspend the permit at the event for any violation of a law, regulation or permit stipulation. The Manual states that "[p]ermits shall be immediately suspended, and other appropriate penalties imposed, for violations of Federal, State, or local laws, regulations, or permit stipulations providing for the safety or health of the public." BLM Manual at VII-2. Reed has failed to submit any evidence that Burning Man organizers violated any law or regulation. The only stipulation which Reed contends the organizers violated was one which imposed on Burning Man organizers responsibility "for all acts of safety associated with the event." The BLM's determination concerning whether Burning Man organizers acted responsibly is discretionary and would qualify for protection under the discretionary function exception. However, it [sic] not necessary to address that issue because the Manual's requirement that the BLM suspend a permit for a violation of a law, regulation or permit stipulation is nothing more than agency policy. "Policies are the result of discretionary decisions and are established to guide the agency's employees; a declaration of policy does not create a legally enforceable duty." *Concrete Tie of San Diego, Inc. v. Liberty Construction, Inc.*, 107 F.3d 1368, 1372 (9th Cir. 1997). Therefore, the BLM is not under a mandatory obligation to suspend a permit if a stipulation is violated.

Furthermore, the idea that the BLM had a duty to suspend the permit if a law or stipulation was violated contradicts the applicable regulation and common sense. The applicable regulation provides that the "authorized

officer *may* suspend a special recreation permit if necessary to protect public health, public safety, or the environment." 43 C.F.R. § 8372.5(a)(1) (emphasis added).[2] This language is permissive, bestowing discretion rather than imposing a mandatory duty. Furthermore, common sense requires that the decision be discretionary. Any interpretation of policy that required the BLM to suspend a permit when any participant broke any law might result in greater danger to public safety. This might occur, for instance, if a permit were suspended in the middle of the night or during adverse weather conditions because a participant failed to come to a complete stop at a traffic signal. Mandatory suspension of the permit and the subsequent evacuation of participants could prove more dangerous to health and safety than allowing the event to proceed. Such an absurd outcome is avoided because the BLM retains discretion regarding permit suspension. The factors to be considered – health, safety, and the environment – clearly involve public policy. Therefore, the BLM's decision not to suspend the permit is protected by the discretionary function exception.

As a final element of his argument, Reed asserts that the BLM was negligent when it did not enforce the conditions and stipulations of the permit. Specifically, Reed argues that the BLM "failed to take any steps to ensure that Burning Man complied with the conditions and stipulations of the permit providing for safety." Reed has

---

[2] In its argument, the United States cited 43 C.F.R. § 2920.9-3. The more relevant regulation, however, is that cited by the Court, directly concerning special recreation permits of the type involved in this case.

submitted no evidence, however, that the BLM was under a mandatory duty to enforce the conditions and stipulations of the permit. The only duty to which Reed refers in this context is one concerning a performance evaluation. The BLM Manual imposes on the BLM an obligation to conduct, at a minimum, an annual performance evaluation. The Manual describes the purpose of such an evaluation as follows:

> The purpose of a performance evaluation is to: evaluate a permittee's performance and compliance with the terms and conditions of the permit; determine if use complies with management plan objectives; review past year receipts to determine overpayment or underpayment; use the evaluation as a criterion in issuing a new permit or renewing an existing permit; or other purposes as defined by the authorized officer.

BLM Manual at VII-1. The Manual states that standards used to evaluate performance "are developed by the authorized officer in consultation with the permittee(s), and others as appropriate." *Id.* In developing an evaluation, important considerations include "the degree of compliance with conditions of the permit and operating plans, the protection of resource values, and quality of services rendered to the public." *Id.*

Thus, the BLM is under a duty to conduct an annual performance evaluation. This evaluation, however, does not require enforcement of permit conditions or stipulations during an event. An evaluation whose purpose is to determine compliance with conditions and stipulations

does not impose an additional requirement that the evaluator enforce the conditions and stipulations during an event. Even if this were the case, the standards used in an evaluation are left to the discretion of the BLM, in accordance with considerations of public policy. Even though Reed may disagree with the BLM's decision in this case, the discretionary function exception is designed to protect such decisions from "judicial second-guessing." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 814 (1984) (in enacting the statute containing the discretionary function exception, "Congress wished to prevent judicial 'second guessing' ").

C. Failure to Warn Campers

Reed next argues that the BLM had a mandatory duty to warn campers of the danger posed by reckless drivers. According to Reed, the BLM's status as a landowner who permitted others to use its land imposed a common law duty to assure that the activities conducted on the land are not conducted negligently. Reed's argument is without merit.

A generally accepted rule of common law is that the lessor of land (no matter how long or short the period) is not subject to liability to his lessee, or others upon the land with the consent of the lessee, for physical harm caused by any dangerous condition which comes into existence after the lessee has taken possession, with certain defined exception. *See Restatement (Second) of Torts* § 355. The recognized exceptions may be summarized as follows:

1. When the lessor contracts to repair the premises and fails to do so;

2. When there were undisclosed dangerous conditions known to the lessor and unknown to the lessee;

3. When lessor knows the lessee will admit the public and knows or has reason to know of a dangerous condition on the land existing when the lessee takes possession;

4. When parts of the land are retained in the lessor's control, which lessee is entitled to use, or will use by necessity; and

5. When the lessor undertakes to repair the premises and does so negligently.

Restatement (Second) of Torts §§ 357-362.

In this case, the BLM charged the Burning Man organizers a per-person daily fee for use of the land. Having received payment for the use of the land, the BLM is a lessor, and the organizers of Burning Man 1996 are lessees, of the land. As none of the five exceptions described above alters the common law rule limiting liability, a landowner would not be found liable for failure to warn under the circumstances of this case. Because the federal government can only be sued "under circumstances where [it], if a private person, would be liable," 28 U.S.C. § 1346(b), it cannot be found liable either. Reed's claim regarding the BLM's duty to warn campers must fail.

Furthermore, the BLM has the discretion to include in a permit "such stipulations as the authorized officer considers necessary to protect the lands and resources involved and the public interest in general." 43 C.F.R.

§ 8372.5(b). In the stipulations attached to the 1996 Burning Man permit, the organizers agreed "to assume responsibility for public safety and health during any phase of the event, including, but not limited to the following: . . . all acts of safety associated with the event." The decision to delegate responsibility for safety to the permittee of an event such as Burning Man, implicates the BLM's authority to issue a permit and falls within the discretionary function exception, as discussed, *supra*, at III.A.

D. Failure to Enforce Laws

Finally, Reed argues that the BLM had a duty to enforce all applicable federal, state and local laws at the Burning Man event. He argues that this was a mandatory duty, and that the BLM's negligent failure to enforce the law does not fall within the discretionary function exception to the FTCA. Reed's argument is without merit.

The enforcement of law is a uniquely governmental function, and "[w]hen the United States is sued for torts committed in the course of 'uniquely governmental functions,' this circuit allows recovery only when a state or local government would be liable under like circumstances." *Cameron v. Janssen Bros. Nurseries, Ltd.*, 7 F.3d 821, 825 (9th Cir. 1993).

In Nevada, where Burning Man 1996 took place, a "law enforcement agency is not liable for the negligent acts or omissions of its . . . officers" unless (1) the officers "made a specific promise or representation to a natural person who relied upon the promise or representation to

his detriment" or (2) the officers' conduct "affirmatively caused the harm." Nev. Rev. Stat. § 41.0336.[3] As neither of these exceptions is applicable here, a state or local government would not be liable for the negligence of its officers. Accordingly, the United States cannot be liable for the BLM's alleged negligent enforcement of any federal, state, or local law.

E. Reed's Motion to Strike Citations to Unpublished Dispositions

In support of its motion for summary judgment, the United States cited several unpublished dispositions from the Ninth Circuit. These opinions, although readily available from electronic databases, explicitly state that they are not for publication and that pursuant to Ninth Circuit Rule 36-3 they are not to be used as precedent and should not be cited. Reed objects to these citations and moves to strike them.

Ninth Circuit Rule 36-3 states:

> Any disposition that is not an opinion or an order designated for publication under Circuit Rule 36-5 shall not be regarded as precedent and shall not be cited to or by this Court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.

---

[3] Similarly, California law provides that "public entity is not liable for an injury caused . . . by failing to enforce any law." Cal. Gov't Code § 818.2.

Ninth Circuit Rule 36-3. The Rule makes clear that any citation to unpublished dispositions is improper. The United States' argument regarding the propriety of citing unpublished dispositions merely as persuasive authority is without merit. Accordingly, the Court GRANTS Reed's motion to strike and hereby STRIKES all citations to unpublished dispositions.

F. Evidentiary Objections

In connection with the present motion for summary judgment, Reed and the United States each filed evidentiary objections. The parties' objections are addressed in turn.

1. Reed's Evidentiary Objections

On October 28, 1998, Reed objected to the Declaration of Ron Wenker, the current District Manager of the Medford, Oregon District office of the BLM. On November 16, 1998, Reed objected to the Declaration of Bud Cribley, Assistant District Manager for Nonrenewable Resources for the Winnemucca District of the BLM at all relevant times, and to the Further Declaration of Ron Wenker. Reed's objections include: (1) the declarations contain statements which are not based upon personal knowledge; (2) the declarants rely upon reports and records which are unidentified, not authenticated, and not attached to the declarations for further review; (3) the declarants render opinions which they are not competent to render; and (4) the declarations contain statements that are hearsay.

The Court has not relied on any portion of the evidence submitted by the United States to which Reed objected. Therefore, Reed's objections may be sustained without altering either the analysis or conclusion in this Order.

2. The United States' Evidentiary Objections

The United States objected to various exhibits to the Declaration of Michael Shea submitted by Reed. Because the Court decides the motion in the United States' favor, those objections are overruled as moot.

IV. CONCLUSION

The allegedly negligent actions of the BLM – issuing the organizers of Burning Man 1996 a special recreation permit; not enforcing or suspending the permit during the event; failing to warn campers of the danger posed by reckless drivers during the event; and failing to enforce applicable local, state and federal laws during the event – were all discretionary as they involved an element of judgment or choice and the balancing of various policy objectives. The judgment exercised by the BLM is of the type that the discretionary function exception was designed to shield. Accordingly, the Court lacks subject matter jurisdiction over Reed's claims against the United States. The United States' motion for summary judgment (docket no. 50) is therefore GRANTED.

IT IS SO ORDERED.

DATED: 12/10/98

/s/ Spencer Williams
SPENCER WILLIAMS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DANIEL REED,	)	
	)	
Plaintiff,	)	CIVIL NO.
	)	97-20760 SW
v.	)	
	)	JUDGMENT
	)	
AVIS RENT-A-CAR, et al.,	)	(Filed Dec. 10, 1998)
	)	
Defendants.	)	
	)	

In accordance with Fed. R. Civ. P. 54(b) and in light of this Court's Order Granting Defendant United States' Motion For Summary Judgment, the Court determines that there is no just reason for delay of entry of judgment as to Defendant United States.

It is therefore ORDERED, ADJUDGED AND DECREED that judgment be entered in the above-captioned matter in favor of Defendant United States, each party to bear its own costs.

IT IS SO ORDERED.

DATED: 12/10/98

/s/ Spencer Williams
SPENCER WILLIAMS
United States District Judge

28 U.S.C. Sec. 1346. United States as defendant

* * *

(b)

(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

* * *

28 U.S.C. Sec. 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to –

- (a)

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * *

---

43 C.F.R. Sec. 8372.3 Issuance of permits.

The approval of an application and subsequent issuance of a special recreation permit is discretionary with the authorized officer.

* * *

---

43 C.F.R. Sec. 8372.5 Terms.

(a) General. (1) The authorized officer may suspend a special recreation permit if necessary to protect public health, public safety, or the environment. The terms of the permit shall continue to run during any such suspension.

(2) Permits may be issued for a day, season of use, or such other time period considered appropriate by the authorized officer for the use involved.

(3) A special recreation permit will not be issued for an area larger than the authorized officer determines is necessary for the contemplated use. The land may be surveyed or unsurveyed.

(4) The operator or permittee shall allow the authorized officer, or other duly authorized representative of the Bureau, to have access to and the right to examine any directly pertinent books, documents, papers, and records of the operator or permittee involving transactions related to the permit. The operator or permittee also will allow the authorized officer, or other duly authorized representative of the Bureau, to have access to and the right to examine any directly pertinent books, documents, papers, and records of any employee or agent of the permittee or operator. These allowances and rights terminate 3 years after the expiration of the permit.

(b) Stipulations. A special recreation permit will contain such stipulations as the authorized officer considers necessary to protect the lands and resources involved and the public interest in general.

(c) Bonds. In addition to a payment bond, the authorized officer may require the posting of a cash or surety bond or other guarantee in such form and in such amount as the authorized officer determines to be sufficient to defray the costs of restoration and rehabilitation of the lands affected by the permitted use. Bonds and guarantees will be returned to the permittee upon satisfactory compliance with all permit stipulations, including restoration and rehabilitation requirements.

(d) Insurance. The authorized officer shall require all commercial and competitive applicants, and may require other applicants, to obtain and submit a property damage, personal injury, and public liability insurance policy which he judges sufficient to protect the public and the United States. The policy shall name the U.S. Government as a co-insured and stipulate that the authorized officer of the Bureau of Land Management shall be notified 30 days in advance of the termination or modification of the policy.

(e) Liability. The permittee shall indemnify the United States against any responsibility or liability for damage, injury, or loss to persons and property which may occur during the permitted use period or as a result of such use.

(f) Violation of law. The conviction of a violation of any Federal or State law or regulation concerning the conservation or protection of natural resources, the environment, endangered species, or antiquities that is related to said special recreation permit may result in the cancellation of the permit.

43 C.F.R. Sec. 2920.9-2 Operation and maintenance.

The authorized officer shall inspect and monitor the operation and maintenance of the land use authorization area, its facilities and improvements to assure compliance with the plan of management and protection of the resources, the environment and the public health, safety and welfare, and the holder of the land use authorization shall take corrective action as required by the authorized officer.

---

43 C.F.R. Sec. 2920.9-3 Termination and suspension.

(a) Land use authorization may be terminated under the following circumstances:

(1) If a land use authorization provides by its terms that it shall terminate on the occurrence of a fixed or agreed-upon event, the land use authorization shall thereupon automatically terminate by operation of law upon the occurrence of such event.

(2) Noncompliance with applicable law, regulations or terms and conditions of the land use authorization.

(3) Failure of the holder to use the land use authorization for the purpose for which it was authorized. Failure to construct or nonuse for any continuous 2-year period shall constitute a presumption of abandonment and termination.

(4) Mutual agreement that the land use authorization should be terminated.

(5) Nonpayment of rent for 2 consecutive months, following notice of payment due.

(6) So that the public lands covered by the permit can be disposed of or used for any other purpose.

(b)(1) Upon determination that there is noncompliance with the terms and conditions of a land use authorization which adversely affects the public health, safety or welfare or the environment, the authorized officer shall issue an immediate temporary suspension.

(2) The authorized officer may give an immediate temporary suspension order orally or in writing at the site of the activity to the holder or a contractor or subcontractor of the holder, or to any representative, agent, employee or contractor of any of them, and the suspended activity shall cease at that time. As soon as practicable, the authorized officer shall confirm the order by a written notice to the holder addressed to the holder or the holder's designated agent. The authorized officer may also take such action considered necessary to require correction of such defects prior to an administrative proceeding.

(3) The authorized officer may order immediate temporary suspension of an activity regardless of any action that has been or is being taken by another Federal agency or a State agency.

(4) An order of temporary suspension of activities shall remain effective until the authorized officer issues an order permitting resumption of activities.

(5) Any time after an order of suspension has been issued, the holder may file with the authorized officer a request for permission to resume. The request shall be in writing and shall contain a statement of the facts supporting the request.

(6) The authorized officer may render an order to either grant or deny the request to resume within 5 working days of the date the request is filed. If the authorized officer does not render an order on the request within 5 working days, the request shall be considered denied, the holder shall have the same right to appeal the denial as if an order denying the request had been issued.

(c) Process for termination or suspension other than temporary immediate suspension.

(1) Prior to commencing any proceeding to suspend or terminate a land use authorization, the authorized officer shall give written notice to the holder of the legal grounds for such action and shall give the holder a reasonable time to correct any noncompliance.

(2) After due notice of termination or suspension to the holder of a land use authorization, if noncompliance still exists after a reasonable time, the authorized officer shall give written notice to the holder and refer the matter to the Office of Hearings and Appeals for a hearing before an Administrative Law Judge pursuant to 43 CFR 4.420-4.439. The authorized officer shall suspend or revoke the land use authorization if the Administrative Law Judge determines that grounds for suspension or revocation exists and that such action is justified.

(3) The authorized officer shall terminate a suspension order when the authorized officer determines that the violation causing such suspension has been rectified.

(d) Upon termination, revocation or cancellation of a land use authorization, the holder shall remove all structures and improvements except those owned by the United States within 60 days of the notice of termination, revocation or cancellation and shall restore the site to its pre-use condition, unless otherwise agreed upon in writing or in the land use authorization. If the holder fails to remove all such structures or improvements within a reasonable time period, they shall become the property of the United States, but that shall not relieve the holder of liability for the cost of their removal and restoration of the site.

BLM Manual H-8372-1, VIIC

H-8372-1 – SPECIAL RECREATION PERMITS FOR COMMERCIAL USE

Table of Contents

Chapter — Page

I. Issuance of Permits I-1

A. When Permits are Required I-1

B. Availability of Permits I-1

C. Application Procedures I-2

D. Supplemental Information I-2

E. Award of Permits I-3

F. Permit Duration I-3

Illustration

1. Steps Required in Issuing a Commercial Special Recreation Permit

II. Allocation of Use II-1

A. When Use Must Be Allocated II-1

B. Indirect Allocation Actions II-2

C. Direct Allocation Actions II-2

D. Methods of Allocation Use II-2

1. Lottery II-2

2. Historical Use II-2

3. Competitive System II-3

4. Common Pool II-3

E. Methods of Reducing Use II-4

III. Renewal of Permits III-1

A. When Permits May be Renewed III-1

B. Process of Renewal III-1

IV. Transfer of Permit Privileges IV-1

V. Fees V-1

A. General Procedure V-1

B. Deductions and Discounts V-1

1. Deductions for Transportation and Lodging V-1

2. Discount for Nonpublic Land Use V-2

C. Minimum Fee V-2

D. Fee Collection V-3

1. Estimated Fees V-3

2. Periodic Payments V-3

E. Refunds and Non-Use Payments V-3

F. Other Fees Associated with Permit V-3

1. Site Reservation Fee V-3

2. Livestock Grazing Fees V-4

G. Approval to Waive or Vary Fees V-4

Illustrations

1. Example of Eligible Deductions and Discounts

2. Example of Fee Collection

VI. Terms and Conditions of Use VI-1
A. General Terms VI-1
B. Special Stipulations VI-3
C. Bonds VI-3
D. Insurance and Liability VI-3
VII. Permit Administration VII-1
A. Monitoring for Compliance VII-1
B. Performance Evaluation VII-1
C. Violations and Penalties VII-2
D. Inspection of Records VII-3
E. Reporting Requirements VII-3
F. Coordination and Joint Permits VII-4
VIII. Protests and Appeals VIII-1
A. Protests VIII-1
B. Appeals VIII-1

Glossary of Terms

* * *

H-8372-1 – SPECIAL RECREATION PERMITS FOR COMMERCIAL USE

Chapter 7

Three different performance levels are recognized: acceptable, probationary, and unacceptable. An opportunity to address probationary or unacceptable performance items may be given to the permittee consistent with other stipulations in the permit, and prior to any

decision regarding cancellation or other disciplinary measures. Ratings are confidential between the BLM and the permittee, except that to the extent allowable by law or regulation. If a permittee receives a probationary or unacceptable summary rating, notification of such rating may be forwarded to the State outfitter licensing board, and/or related outfitter/guide associations. A copy of the completed evaluation will be maintained in the permittee's permanent file.

A permittee given a probationary performance rating will only qualify for a permit not to exceed one year, and permits with remaining periods of more than one year will be so amended.

C. Violations and Penalties – Violation of the operating plan requirements, rules of conduct, or other Federal, State, or local regulations by a permittee or a permittee's employees or agents on any federally administered lands or related waters can result in administrative penalties issued against the permittee(s) by the authorized officer. Specific administrative penalties should be identified in a permittee's operating plan. These administrative penalties may be in addition to civil and criminal charges which may be brought against a permittee by the BLM.

Administrative penalties should be reciprocal, whenever possible, between BLM offices or other administering agencies. A memorandum of understanding should be developed that identifies the penalty policy, or specific penalties that would apply.

Permits shall be immediately suspended, and other appropriate penalties imposed, for violations of Federal,

State, or local laws, regulations, or permit stipulations providing for the safety or health of the public. An example could be the lack of a required local license for food service.

Alleged violations will be brought to the attention of the involved permittee(s) by the authorized officer, either by telephone, personal contact, or in writing. Based upon available information, the authorized officer will notify the involved permittee(s), in writing (by registered mail if necessary), explaining the nature of the violation and any steps the permittee(s) must take to remedy the situation. If an adverse administrative penalty is to be assessed a permittee, the authorized officer should follow the procedures outlined in Chapter VIII, Protests and Appeals.

The permittee must take immediate steps to rectify the situation to the satisfaction of the authorized officer. Depending upon the severity of the violation and/or the permittee's ability to rectify the violation, the authorized officer reserves the discretionary authority to impose specific penalties upon the permittee, including, but not limited to: permit privilege denial, probation, suspension, or revocation, in whole or in part, and without compensation. This action affects both those permittees who hold current authorized permittee status on the permitted area and those who do not. For example, permittees providing commercial services not authorized by their permit may have future requests for permit privileges denied on all other federally administered areas for 1 to 3 years. Outfitters serving court ordered probation for violation of Federal regulations pertaining to public lands and resources may similarly have permit privileges denied for the duration of the probation period.

All communications should be documented in the permittees' permanent file. Information on violations shall be made part of a permittees' annual performance evaluation.

A less than acceptable performance evaluation will result in probation, suspension, or revocation of all or a portion of the permit privileges as identified in the operating plan or related regulations. If the permittee receives a probationary level 2 years in a row, the authorized officer may suspend or terminate the permit and/or deny future permit applications.

D. Inspection of Records – The authorized officer, or other duly authorized representative of the BLM, may examine any of the records or other documents related to the permit, of the permittee or the permittee's operator, employee, or agent for up to 3 years after expiration of the permit. This should be done on an as needed basis.

E. Reporting Requirements – The authorized officer may establish reasonable reporting requirements for permittees. Information may be requested on the number of clients served, fees collected, and related matters. The authorized officer may establish reasonable time requirements for the submission of these reports such as on a daily basis, within 10 days of the end of the month, seasonally, or annually. For individual commercial events, the post use questionnaire contained in Form 8370-1 may be sufficient.

The authorized officer should ensure that the information collected from permittees is of sufficient detail to

allow the preparation and submission of the BLM standard annual recreation report on a fiscal year basis.

* * *

TITLE 43 – PUBLIC LANDS; INTERIOR

CHAPTER II – BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR

PART 2920 – LEASES, PERMITS AND EASEMENTS – Table of Contents

Subpart 2920 – Leases, Permits and Easements: General Provisions

Sec. 2920.1-1 Authorized use.

Any use not specifically authorized under other laws or regulations and not specifically forbidden by law may be authorized under this part. Uses which may be authorized include residential, agricultural, industrial, and commercial, and uses that cannot be authorized under title V of the Federal Land Policy and Management Act or section 28 of the Mineral Leasing Act. Land use authorizations shall be granted under the following categories:

(a) Leases shall be used to authorize uses of public lands involving substantial construction, development, or land improvement and the investment of large amounts of capital which are to be amortized over time. A lease conveys a possessory interest and is revocable only in accordance with its terms and the provisions of Sec. 2920.9-3 of this title. Leases shall be issued for a term, determined by the authorized officer, that is consistent with the time required to amortize the capital investment.

(b) Permits shall be used to authorize uses of public lands for not to exceed 3 years that involve either little or no land improvement, construction, or investment, or investment which can be amortized within the term of the permit. A permit conveys no possessory interest. The

permit is renewable at the discretion of the authorized officer and may be revoked in accordance with its terms and the provisions of Sec. 2920.9-3 of this title. Permits shall be issued on a form approved by the Director, Bureau of Land Management, that has been filed by the applicant with the appropriate Bureau of Land Management office.

(c) Easements may be used to assure that uses of public lands are compatible with non-Federal uses occurring on adjacent or nearby land. The term of the easement shall be determined by the authorized officer. An easement granted under this part may be issued only for purposes not authorized under title V of the Federal Land Policy and Management Act or section 28 of the Mineral Leasing Act.

[[Page 229]]

(d) No land use authorization is required under the regulations in this part for casual use of the public lands.

[52 FR 49115, Dec. 29, 1987]

Nevada Recreational Use Statute

Nev. Rev. Stat. Ann. § 41.510 (1993)

§ 41.510. Limitation of liability; exceptions for malicious acts if consideration is given or other duty exists. [Effective June 30, 1995.]

1. Except as otherwise provided in subsection 3, an owner, lessee or occupant of premises owes no duty to keep the premises safe for entry or use by others for crossing over to public land, hunting, fishing, trapping, camping, hiking, sightseeing, hang gliding, para-gliding or for any other recreational purposes, or to give warning of any hazardous condition, activity or use of any structure on the premises to persons entering for those purposes.

2. Except as otherwise provided in subsection 3, if an owner, lessee or occupant of premises gives permission to another to cross over to public land, hunt, fish, trap, camp, hike, sightsee, hang glide, para-glide or participate in other recreational activities, upon his premises:

(a) He does not thereby extend any assurance that the premises are safe for that purpose, constitute the person to whom permission is granted an invitee to whom a duty of care is owed, or assume responsibility for or incur liability for any injury to person or property caused by an act of persons to whom the permission is granted.

(b) That person does not thereby acquire any property rights in or rights of easement to the premises.

3. This section does not:

(a) Limit the liability which would otherwise exist for:

(1) Willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity.

(2) Injury suffered in any case where permission to cross over to public land, hunt, fish, trap, camp, hike, sightsee, hang glide, para-glide or participate in other recreational activities, was granted for a consideration other than the consideration, if any, paid to the landowner by the state or any subdivision thereof.

(3) Injury caused by acts of persons to whom permission to cross over to public land, hunt, fish, trap, camp, hike, sightsee, hang glide, para-glide or participate in other recreational activities was granted, to other persons as to whom the person granting permission, or the owner, lessee or occupant of the premises, owed a duty to keep the premises safe or to warn of danger.

(b) Create a duty of care or ground of liability for injury to person or property.

HISTORY: 1963, p. 799; 1971, p. 192; 1973, p. 898; 1981, p. 157; 1991, ch. 111, s 1, p. 185; 1991, ch. 649, s 6, p. 2156; 1993, ch. 374, s 2, p. 1191.

Supreme Court, U.S.
FILED
APR 3 2001

(2)

No. 00-1246

In the Supreme Court of the United States

DANIEL REED, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record
STUART E. SCHIFFER
Acting Assistant Attorney General
MARK B. STERN
PETER J. SMITH
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), protects the Bureau of Land Management's decision to issue a permit for an outdoor festival, the terms of that permit, and the decision not to suspend the festival.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Berkovitz v. *United States*, 486 U.S. 531 (1988)	4, 5, 6, 7, 8
Boyd v. *United States*, 881 F.2d 895 (10th Cir. 1989)	11
Cope v. *Scott*, 45 F.3d 445 (D.C. Cir. 1995)	11, 12
Duke v. *Department of Agric.*, 131 F.3d 1407 (10th Cir. 1997)	11, 12
Faber v. *United States*, 56 F.3d 1122 (9th Cir. 1995)	12
Gotha v. *United States*, 115 F.3d 176 (3d Cir. 1997)	13
McMurray v. *United States*, 918 F.2d 834 (9th Cir. 1990)	12
Myers v. *United States*, 17 F.3d 890 (6th Cir. 1994)	9
Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989)	7
Routh v. *United States*, 941 F.2d 853 (9th Cir. 1991)	12
United States v. *Gaubert*, 499 U.S. 315 (1991)	6, 7, 13
United States v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984)	6, 7
Wisniewski v. *United States*, 353 U.S. 901 (1957)	12

Constitution, statutes and regulations:

U.S. Const. Amend. I	10
Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq.*	9
Federal Tort Claims Act:	
28 U.S.C. 1346(b) (1994 & Supp. IV 1998)	6
28 U.S.C. 2671-2680	4

Statutes and regulations—Continued: Page

28 U.S.C. 2674 6
28 U.S.C. 2679 4
28 U.S.C. 2680(a) 4, 6
National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 3
43 U.S.C. 1201 2
43 U.S.C. 1701 2
43 U.S.C. 1701(a)(8) 2
43 U.S.C. 1731 2
43 C.F.R.:
Pt. 2920:
Subpt. 2920 7
Section 2920.9-3(b)(1) 7, 8, 9
Pt. 8360:
Section 8360.0-5(c) 2, 3, 8
Pt. 8370:
Subpt. 8372 ..... 2, 8
Section 8372.0-5(a) 2
Section 8372.1-1 2
Section 8372.2 3
Section 8372.3 ..... 3, 13
Section 8372.5(a)(1) 8
Section 8372.5(b) 3, 10

In the Supreme Court of the United States

No. 00-1246

DANIEL REED, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 231 F.3d 501. The opinion of the district court (Pet. App. 17-34) is reported at 29 F. Supp. 2d 1121.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 2000. The petition for a writ of certiorari was filed on January 31, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Secretary of the Department of the Interior has broad authority, through the Bureau of Land Management (BLM), to manage the public lands. 43 U.S.C. 1201, 1701, 1731. Congress has stated that "the public lands [should] be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values[,] * * * preserve and protect certain public lands in their natural condition [, and] * * * provide for outdoor recreation and human occupancy and use." 43 U.S.C. 1701(a)(8). To carry out that objective, the Secretary has promulgated regulations governing, among other things, recreational use of lands administered by BLM. 43 C.F.R. Subpt. 8372.

Special recreation permits are required for various commercial and other uses of lands and waters administered by BLM. 43 C.F.R. 8372.1-1; see also 43 C.F.R. 8372.0-5(a) (defining "commercial use"). The Secretary has issued specific regulations to govern the issuance of "special recreation permits other than on developed recreation sites." 43 C.F.R. Subpt. 8372 (capitalization omitted). The regulations define "[d]eveloped sites and areas" to mean "sites and areas that contain structures or capital improvements primarily used by the public for recreation purposes." 43 C.F.R. 8360.0-5(c). Developed sites often include such features as "delineated spaces for parking, camping or boat launching; sanitary facilities; potable water; grills or fire rings; tables; or controlled access." *Ibid.* Sites that remain in their natural condition, in contrast, are not considered developed sites. On such undeveloped sites, the "approval of an application and subsequent issuance of a

special recreation permit is *discretionary* with the authorized [BLM] officer." 43 C.F.R. 8372.3 (emphasis added). The regulations vest the relevant agency official with discretion to include in such a recreation permit "such stipulations as the authorized officer considers necessary to protect the lands and resources involved and the public interest in general." 43 C.F.R. 8372.5(b).

2. Each year from 1992 to 1996, the promoters of the Burning Man Festival, a multi-day performance arts event at which "people gather to erect and burn a large human effigy as dedication to the earth's fertility," Pet. App. 3, obtained a special recreation permit from BLM to hold the festival at the Black Rock Desert playa in Nevada. The playa is federally owned and managed by BLM. *Ibid.* It is an "extremely remote area which consists of little more than vast stretches of sun-hardened silt" (*id.* at 18). As such, the playa is not a "developed site" within the meaning of BLM regulations. 43 C.F.R. 8360.0-5(c).

In applying for a special recreation permit in 1996, the organizers of the event, in accordance with 43 C.F.R. 8372.2, submitted a "site plan" that specified the intended physical plan for the festival. Pet. App. 9. After a comment period and the issuance of an Environmental Assessment in compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, BLM deemed the plan adequate and issued a permit that contained a number of stipulations. Pet. App. 8-9. Among the stipulations were the requirements that Burning Man obtain insurance and issue various safety warnings to festival participants.

Petitioner attended the 1996 Burning Man Festival, where he camped in a tent. Pet. App. 5. Early on the morning of the final day of the event, another festival

attendee drove his car over petitioner's tent. *Ibid.* Petitioner suffered serious injuries and was left permanently disabled. *Ibid.*

3. Petitioner, through his conservator, filed suit in federal district court against, among others, various organizers and affiliates of the Burning Man Festival, a rental car company, various municipalities and municipal officials, and the Department of the Interior, Bureau of Land Management. Pet. App. 1. Petitioner asserted claims against the federal defendants under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671-2680.[1]

The United States moved for summary judgment, asserting that petitioner's claims are barred by the discretionary function exception to the FTCA, 28 U.S.C. 2680(a), and the district court granted the motion. Pet. App. 17-34. The court held that all of petitioner's claims, including those arising out of BLM's issuance of the permit, its decision not to suspend the permit, and its alleged failure to warn campers of dangers, sought to second-guess conduct that "involved an element of judgment or choice * * * of the kind that the discretionary function exception was designed to shield." *Id.* at 21.

3. The court of appeals affirmed. The court followed the two-part test that this Court outlined in *Berkovitz* v. *United States*, 486 U.S. 531, 536-537 (1988), for

---

[1] Although petitioner's complaint named as a defendant the Department of Interior, Bureau of Land Management, the proper federal defendant in an FTCA suit is the United States. See 28 U.S.C. 2679; Pet. App. 17 n.1.

determining whether the discretionary function exception applied:

> First, a court must determine whether the challenged action involves an element of choice or judgment. If it does, then secondly, the court must decide 'whether that judgment is of the kind that the discretionary function exception was designed to shield,' which 'protects only governmental actions and decisions based on considerations of public policy.'

Pet. App. 7 (quoting *Berkovitz*, 486 U.S. at 536-537) (citation omitted).

With respect to petitioner's claims arising out of the issuance of the permit—including claims for failure to warn (or requiring the event organizers to warn) of certain hazards and negligent approval of the festival's site plan—the court concluded that "the first prong of the discretionary function test clearly is met" because "BLM was granted discretion to determine whether to issue the permit or not and, if issued, to decide the restrictions to be applied." Pet. App. 7. And the second component of the discretionary function test was satisfied because in approving the site plan BLM "balanced competing public policy concerns, including concerns about public access, safety, resource allocation, and the environment." *Id.* at 8.

The court also concluded that the discretionary function exception barred petitioner's claim arising out of BLM's decision not to suspend the permit. Petitioner had conceded that the decision to suspend involved "choice," and the court concluded that the decision "would necessarily include a discretionary balancing of policy considerations." Pet. App. 13-14.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. The FTCA is a limited waiver of sovereign immunity for certain tort actions against the United States. See 28 U.S.C. 1346(b) (1994 & Supp. IV 1998); 28 U.S.C. 2674. A principal limitation on that waiver of immunity is the discretionary function exception, which immunizes the United States from tort liability for discretionary policy choices made by its employees. Under that exception, courts may not hold the United States liable for "[a]ny claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a).

An action is protected by the exception if (1) "it involves an element of judgment or choice," and (2) the judgment "is of the kind that the discretionary function exception was designed to shield." *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). The first step of the inquiry focuses on whether a "federal statute, regulation, or policy specifically prescribes a course of action" as to the decision at issue. *Ibid.* The second step of the inquiry focuses "on the nature of the actions taken and on whether they are susceptible to policy analysis." *United States* v. *Gaubert*, 499 U.S. 315, 325 (1991); see also *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984) (exception prevents "judicial 'second-guessing'" of decisions "grounded in social, economic, and political

policy"). Petitioner attempts to denigrate this explication of governing law by characterizing it as "dictum." Pet. 11. But this Court's holdings in *Gaubert* and the discretionary function cases that preceded it make clear that determining whether the challenged governmental conduct is "susceptible to policy analysis" is central to the discretionary function inquiry. See 499 U.S. at 325, 331; *Berkovitz*, 486 U.S. at 537; *Varig Airlines*, 467 U.S. at 813. There is no compelling reason for this Court to accept petitionter's invitation (Pet. 10-16) to overrule this precedent, particularly because the discretionary function exception is an issue of statutory interpretation that Congress is always "free to alter." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989).

2. The court of appeals correctly applied the discretionary function test in holding that petitioner's claims against the United States are barred.

a. Petitioner first argues (Pet. 16-19) that the discretionary function exception did not protect "[m]andatory duties under regulation and the BLM Manual" to suspend the permit. Petitioner bases this claim (Pet. 7-8, 16) on 43 C.F.R. 2920.9-3(b)(1), which provides that upon "determination that there is noncompliance with the terms and conditions of a land use authorization which adversely affects the public health, safety or welfare or the environment, the authorized officer shall issue an immediate temporary suspension." But petitioner did not establish in the courts below that this regulation governed the Burning Man Festival permit, and thus it would not be appropriate for this Court to review his claim based on that regulation.[2]

---

[2] The regulation that petitioner relies on is a general, default provision for "leases, permits, and easements." 43 C.F.R. Subpt.

In any event, as the court of appeals explained, BLM retains discretion even assuming 43 C.F.R. 2920.9-3(b)(1) applies. Pet. App. 13 n.8. That is because a condition precedent to the suspension—a finding that the violation "adversely affects the public health, safety or welfare or the environment" (43 C.F.R. 2920.9-3(b)(1)—necessarily "involves an element of judgment or choice," *Berkovitz*, 486 U.S. at 536. Indeed, petitioner conceded in the court of appeals that the suspension decision under this regulation involves discretion because "the determination as to whether a violation affects public health or safety implies choice." Pet. App. 13.

Thus, the only contested issue is whether that discretion implicates public policy considerations. As the court of appeals explained, the factors that the regu-

---

2920 (capitalization omitted). But a prospective permittee who seeks to engage in certain commercial activities on non-developed public land must obtain a "special recreation permit" pursuant to 43 C.F.R. Subpart 8372. Petitioner did not dispute below that the organizers of the Burning Man Festival were required to, and did, obtain this special recreation permit. See, *e.g.*, Appellant Br. 40. And, as noted above, the Black Rock Desert playa is not a developed site. See 43 C.F.R. 8360.0-5(c); see also Pet. 3 (describing the playa as "one of the most desolate * * * places on Earth"). Section 8372.5(a)(1) specifically addresses and therefore governs suspension of "special recreation permits" for non-developed lands. That regulation is permissive: "The authorized officer *may* suspend a special recreation permit if necessary to protect public health, public safety, or the environment." 43 C.F.R. 8372.5(a)(1) (emphasis added); see also Pet. App. 24-25.

The district court held that Section 8372.5(a)(1) was the applicable regulation because the Burning Man Festival permit was a special recreation permit for non-developed land. Pet. App. 24-25. The court of appeals did not decide which regulation applied because it found that the discretionary function exception applied even to the regulation that the petitioner invokes. *Id.* at 13 & n.8.

lation directs BLM to consider—public health, safety, and the environment (43 C.F.R. 2920.9-3(b)(1))—"clearly involve public policy." Pet. App. 25; see also *id.* at 14.

Contrary to petitioner's contention, the decision in this case does not conflict with *Myers* v. *United States*, 17 F.3d 890 (6th Cir. 1994). *Myers* involved government inspections for mine safety under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq.* In *Myers*, the government failed to "demonstrate that any consideration of 'political, social or economic policy' by MSHA inspectors is, in fact, authorized by the regulatory scheme." 17 F.3d at 897; see also *id.* at 898 ("Considerations of 'political, social or economic policy' are not *authorized* to play a part in these assessments."). The mining regulations in that case were framed in expressly mandatory terms: "*if* a 'violation' is found, * * * *then* inspectors *must* issue a withdrawal order." See, *e.g.*, *id.* at 895 ("*[I]f* two 'unwarrantable failure violations' are found within 90 days, *then* inspectors *must* issue a withdrawal order."). The court thus concluded that the "MSHA inspectors * * * are *not authorized* to reweigh [policy] interests on a case- by-case basis. Rather, they are to determine compliance and, in the event of non-compliance, issue the mandatory citations and orders." *Id.* at 898. In contrast, 43 C.F.R. 2920.9-3(b)(1) vests discretion in BLM officials to weigh public policy concerns. The regulation provides that after determining non-compliance, BLM officials must weigh public health, safety, and environmental concerns in determining whether to suspend a permit. *Ibid.* Because the regulatory scheme in this case expressly authorizes BLM officials to consider public policy issues, the decision in this case does not conflict with *Myers*.

b. Petitioner also argues (Pet. 19-25) that the discretionary function exception does not protect BLM's failure to warn, or to specify in the permit what warnings the permittee should issue, about the dangers of camping at the Burning Man Festival. The courts below correctly found, however, that BLM's decision to delegate safety responsibility to the permit holder falls within the discretionary function exception.

BLM has the regulatory authority to include in a permit "such stipulations as the authorized officer considers necessary to protect the lands and resources involved and the public interest in general." 43 C.F.R. 8372.5(b). BLM exercised this discretion when it included in the 1996 Burning Man Festival permit a stipulation in which the organizers agreed "to assume responsibility for public safety and health during any phase of the event, including, but not limited to * * * all acts of safety associated with the event." Pet. App. 29. As the court of appeals explained, BLM decided on the terms of the permit— including the decision to delegate safety responsibility to the event organizers—after seeking comments about the permit application, reviewing those comments, and then issuing an Environmental Assessment in compliance with NEPA. *Id.* at 8-9. Throughout this process, BLM weighed a number of factors, including resource allocation, cooperative efforts with local law enforcement, the Burning Man Festival's prior compliance with BLM licensing requirements (*id.* at 9-10), First Amendment concerns about abridging rights of expression and association (*id.* at 10), and the BLM's goal of providing "as many recreational opportunities as possible * * * without undue environmental degradation" (*id.* at 9). The discretionary function

exception protects this type of thorough, policy-based decisionmaking.

Petitioner contends that the court of appeals' treatment of the failure to warn claim in this case conflicts with two decisions of the Tenth Circuit. Pet. 20-25 (citing *Duke* v. *Department of Agric.*, 131 F.3d 1407 (10th Cir. 1997); *Boyd* v. *United States*, 881 F.2d 895 (10th Cir. 1989)). Neither of those cases, however, involved a BLM permit in which the agency had deliberately delegated responsibility to the permit holder for the safety concerns created by the grant of the permit. Rather, the plaintiffs in those cases challenged the government's failure to do anything about alleged permanent hazards. And in both of those cases the government did not identify specific policy concerns that influenced the government inaction. In *Boyd*, the court concluded that the Army Corps of Engineers' "failure to warn swimmers of dangerous conditions in [a] popular swimming area did not implicate any social, economic, or political policy judgments with which [the] discretionary function exception [is] properly concerned." 881 F.2d at 895. Likewise, in *Duke*, which involved a claim of failure to warn of falling boulders, the court held that the discretionary function exception did not apply because "[a]t this stage the government has not shown how failure to warn or protect from the danger of a boulder rolling down the man-made slope implicated 'political, social, or economic decisions of the sort that the exception was designed to protect.'" 131 F.3d at 1412 (quoting *Cope* v. *Scott*, 45 F.3d 445, 452 (D.C. Cir. 1995)). The court's "review of the record reveal[ed] no evidence by the government of any social or political justification"; instead, the government had "simply relie[d] on the presumption that there was some policy reason for the failure to do anything at the

site." *Ibid.* Neither *Duke* nor *Boyd* involved an application for a special use that created attendant safety concerns. The government's decision to weigh policy considerations and require the permit applicant to address the specific safety concerns created by the proposed use is quite different from an unexplained failure to address a longstanding potential safety hazard. Therefore, there is no indication that this case, which involved deliberate agency action to delegate responsibility for specific, temporary safety concerns in a remote area based on extended consideration of public policy goals, would have been decided any differently in the Tenth Circuit.[3]

c. Petitioner also contends (Pet. 25-29) that the discretionary function exception does not apply to BLM's decision to approve a site plan that did not mandate separate areas for cars and campers. However, the regulations make clear that a decision to approve a site

---

[3] Petitioner also contends that the decision below conflicts with earlier decisions in the Ninth Circuit. Pet. 23-25 (citing *McMurray* v. *United States*, 918 F.2d 834 (9th Cir. 1990); *Faber* v. *United States*, 56 F.3d 1122 (9th Cir. 1995)). But those cases, like the Tenth Circuit cases, did not involve an agency decision to issue a permit and delegate safety responsibility in a remote area to the permit holder. Rather, as the court below explained, those cases involved "allegations of isolated instances of negligence that were not policy-based." Pet. App. 14 (citing *Faber*, 56 F.3d at 1127; *Routh* v. *United States*, 941 F.2d 853, 857 (9th Cir. 1991)). Indeed, *Faber* recognized that the discretionary function exception would apply in failure to warn cases when the "government was required to engage in broad, policy-making activities * * * in the course of making judgments related to safety." 56 F.3d at 1125. As discussed above, BLM did just that in this case. In any event, any inconsistency in intracircuit decisions would be a matter for the court of appeals, rather than this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

plan is discretionary: "The approval of an application and subsequent issuance of a special recreation permit is *discretionary* with the authorized officer." 43 C.F.R. 8372.3 (emphasis added). Thus, the court of appeals properly concluded that "[t]here was one discretionary license issued for this event, and what its terms were and how those terms might be enforced were all discretionary." Pet. App. 11. Moreover, for the reasons discussed above, the court held that such decisions required BLM to balance "competing public policy concerns, including concerns about public access, safety, resource allocation, and the environment." *Id.* at 8.

Contrary to petitioner's suggestion, the decision below does not conflict with the Third Circuit's decision in *Gotha* v. *United States*, 115 F.3d 176 (1997). The *Gotha* court concluded that the Navy's failure to build a stairway with handrails along an unlit, steep access path was not protected by the exception because the challenged actions were "not the kind of conduct that can be said to be grounded in the policy of the regulatory regime." *Id.* at 181-182 (quoting *Gaubert*, 499 U.S. at 325). Here, by contrast, the regulatory regime recognizes that the permit-granting process is discretionary and expressly grants discretion to BLM officers. In exercising this discretion, BLM weighed the views of interested parties about "safety, morality, and the environmental impact of the event" (Pet. App. 8) and conferred with local authorities about safety and other law enforcement measures (*id.* at 10). Plainly, the decisions challenged in this case involved the balancing of important policies, and therefore are protected by the discretionary function exception.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General
STUART E. SCHIFFER
Acting Assistant Attorney General
MARK B. STERN
PETER J. SMITH
Attorneys

APRIL 2001

Supreme Court, U.S.
FILED
APR 19 2001
OFFICE OF THE CLERK

(3)

No. 00-1246

In The

Supreme Court of the United States

DANIEL REED, BY AND THROUGH HIS CONSERVATOR, JOLAINE ALLEN,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

MICHAEL M. SHEA, JR.
Counsel of Record
SHEA & SHEA
A PROFESSIONAL LAW CORPORATION
255 North Market Street
Suite 190
San Jose, CA 95110
(408) 292-2434

ROBERT W. PETERSON
School of Law
Santa Clara University
Santa Clara, CA 95053
(408) 554-4141

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

1211

TABLE OF CONTENTS

Page

ARGUMENT 1

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Berkovitz v. United States, 486 U.S. 531 (1988) 3

Duke v. Department of Agric., 131 F.3d 1407 (10th Cir. 1997) 5, 6

Marlys Bear Medicine v. United States, 241 F.3d 1208 (9th Cir. 2001) 6, 7, 8, 9

McGarry v. United States, 549 F.2d 587 (9th Cir. 1977) 9

Myers v. United States, 17 F.3d 890 (6th Cir. 1994) ... 4, 5

Routh v. United States, 941 F.2d 853 (9th Cir. 1991) 8

United States v. Gaubert, 499 U.S. 315 (1991) ... 1, 2, 8, 9

OTHER AUTHORITIES

43 C.F.R. subpt. 2920.9-3(b)(1) 3, 4

43 C.F.R. 8372.5(a)(1) 4

James Levine, *The Federal Tort Claims Act: A Proposal for Institutional Reform*, 100 Colum. L. Rev. 1538 (2000) 6

ARGUMENT

Respondent's brief (hereinafter Res.) in opposition helps make the case for why these issues and this case are appropriate for review by this Court.

1. Respondent asserts throughout its brief that failure to warn (apparently at all levels, including at the event itself as the event became increasingly dangerous) and failure to separate cars and campers, were "safety" decisions based on "policy." Res. 9, 10, 12, 13. Nowhere, however, does Respondent identify, even hypothetically, the policy or policies that supposedly persuaded the BLM to fail to take any one of these safety measures. To be sure, consideration was given to other policies (environmental protection, free speech issues, and commercial, public use of federal land). But nowhere in the record is there evidence of a policy decision not to warn, nor a policy basis for failure temporarily to suspend the permit when the danger of the event became palpable, nor a policy basis for ignoring standard, objective event planning practice for events of this size.

Respondent's boldness in failing to cite a policy or policies illustrates again the unworkability of this Court's "susceptible to policy analysis" dictum in *United States v. Gaubert*, 499 U.S. 315, 325 (1991). Since there is no decision that is not "susceptible to policy analysis," Respondent need not bother to vouchsafe a policy basis to this Court. In the court below, *ex post* declarations with respect to the permit process make vague, non-specific references to "safety," and the U.S. attorney accepted the invitation of the "susceptible to policy analysis" language to speculate in its brief (with no evidence in the record) that mixing cars and campers in this dangerous environment may be convenient to "car camping." Appellee Br.

24. Surely Congress had something more substantial in mind when it adopted the FTCA.

2. Perhaps the most far-reaching and pernicious concept advanced by Respondent is that, despite the broad waiver of immunity in the FTCA, government agencies administering government lands may simply opt out of the FTCA by delegating their liability to others (in this case the promoter of Burning Man). Res. 10, 11, 12, n.3.

Firstly, contrary to the government's assumption, it is not a necessary or fair reading of the permit in this case to assume that the government *did* delegate its tort responsibility exclusively to Burning Man. The permit should be read as making Burning Man primarily responsible for safety and order, and imposing on Burning Man the obligation to indemnify the government should the government be held liable for the government's own negligence, as landowner, with respect to the event. Indeed, anticipating its possible liability, the government required itself to be named as an additional insured on the $100,000 insurance required of Burning Man. For future events it raised the required limit by 50 fold. Pet. 29.

Should the permit be read as delegating the government's tort liability to Burning Man, it would fly in the face of the FTCA. Quite apart from the conflict among the circuits and the importance of clarifying *Gaubert*, the importance of this issue alone justifies review. The FTCA clearly waives immunity under circumstances in which a private person in the state would be liable. If a private landowner may not delegate its duty to another (especially one with inadequate means to compensate the injured party), neither can a federal agency. Any other reading of the FTCA has never been endorsed by this

Court, nor could it be. It would allow government agencies that find the FTCA inconvenient simply to opt out by administrative fiat. See also section 6, *infra*.

The simplicity of Respondent's arguments belies its staggering scope. The FTCA makes the government liable for negligent conduct of its agents under applicable state law. Discretionary functions, however, are excepted. Respondent argues, in effect, that it is a valid exercise of discretion under the act for federal agencies or agents to transfer all of the tort obligations imposed under the FTCA to other parties *even though applicable state law would not permit the transfer*. The FTCA, therefore, does not apply.

Between coequal branches of government, this riddle or conundrum might present a challenging exercise in logic. As between Congress and subordinate federal agencies, however, Congress must prevail. Having waived sovereign immunity in the FTCA, Congress has occupied the field. Federal agencies may exercise "discretionary" judgments with respect to many other things, but in the absence of special legislation, a federal agency may not, in the guise of discretion, choose to reimpose pre-1946 sovereign immunity on its operations.

3. Respondent ignores the mandatory duty to suspend the permit imposed on the BLM and its agents by its own Manual. Respondent mentions the BLM's Manual only once. Res. 7. In *Berkovitz v. United States*, 486 U.S. 531 (1988), this Court clearly held that a mandatory duty may arise from either statute, regulation, *or policy*. *Id.* at 536. Indeed, this Court remanded *Berkovitz* based on the allegations of the existence of a "policy."

Thus, in the present case it makes no difference whether the duty to protect public safety by a temporary suspension of the permit arises from 43 C.F.R. subpt.

2920.9-3(b)(1) or from 43 C.F.R. 8372.5(a)(1) (see Res. 7 and n.2). The two regulations are united under the one mandatory obligation in the BLM's own Manual. The BLM officials responsible for enforcement and supervision of the permit and Respondent in its brief below both concede that their obligation to temporarily suspend the permit was a mandatory one. Appellee Br. 34, ER Tab 66 at 5. Their contention, that they were unaware of any permit violations by Burning Man, is a factual one to be tested at trial. It would be an extravagant construction of Congress' intent to suggest that ignorance or lack of awareness is choice, but even if ignorance implies "choice," it is hardly choice based on social, economic or political policy.

4. Respondent's attempt to distinguish *Myers v. United States*, 17 F.3d 890 (6th Cir. 1994), grossly misstates the content of the applicable regulation, 43 C.F.R. 2920.9-3(b)(1). Respondent states:

> "The regulation *provides* that *after* determining non-compliance, BLM officials must weigh public health, safety, and environmental concerns in determining whether to suspend a permit." Res. 9. [Emphasis added]

The regulation provides no such thing. 43 C.F.R 2920.9-3(b)(1) provides that:

> "Upon determination that there is noncompliance with the terms and conditions of a land use authorization which adversely affects the public health, safety or welfare or the environment, the authorized officer *shall issue an immediate temporary suspension.*" Pet. App. 40. [Emphasis added]

Should one have any doubt whatsoever about the meaning of this duty, it is resolved by the mandatory duty temporarily to suspend the permit set forth in the BLM

Manual effectuating the regulatory duty. The Sixth Circuit's *Myers* decision is in direct conflict with the Ninth Circuit's decision in the present case.

5. Respondent's attempt to distinguish the Tenth Circuit's conflicting decision in *Duke v. Department of Agric.*, 131 F.3d 1407 (10th Cir. 1997) (failure to warn camper crushed in tent of hazard posed by falling boulders not protected by discretionary function exception) is even less convincing. Petitioner asserts that "[n]either *Duke* nor *Boyd* [failure to warn swimmers of danger from power boats] involved an application for a special use that created attendant safety concerns." Res. 12. This argument simply ignores the obvious. The hazard that injured the plaintiff in *Duke* was engendered by the government's decision to *build a dam and a state road to the dam*. These are discretionary decisions of such scope and magnitude as to beggar the special use permit granted to Burning Man. Respondent, as did the Ninth Circuit (Pet. App. 11) simply endorses the seductive trap that once discretion is found at some level then, just as electromagnetic radiation permeates our environment, discretion permeates all conduct at all levels thereafter.

It is significant that the *Duke* court makes no mention of how the obligations and liabilities between the United States and the State of New Mexico were allocated for the project or the later maintenance of the state road next to which the accident occurred. As complex as these arrangements must surely have been, they are not mentioned by the *Duke* court for the simple reason that they make no difference with respect to the landowner's duty to warn campers of the danger of being injured in their tents. Whatever the contractual relationship between the government and the state, the failure to warn was simply

not a decision based on broad social, economic, or political policy. Thus, *Duke* squarely conflicts with the Ninth Circuit's decision in the present case. One may read as much into the Ninth Circuit's failure to mention *Duke* or to attempt reconciliation of this extensively briefed case with its decision in the present case. (See App. Br. 14, 19, 20-23, 25, 30, 32, 36, Appellee's Br. 28-30, Reply Br. 5, 8, 10, 15, 16)

6. Scholars have noted that the present formulation of the discretionary function exception is incoherent and produces unpredictable and, therefore unfair results. See James Levine, *The Federal Tort Claims Act: A Proposal for Institutional Reform*, 100 Colum. L. Rev. 1538, 1547 n.47 (2000) (collecting scholarly comment). Perhaps there is no better illustration than a more recent decision (March 7, 2001) by a different panel of the Ninth Circuit, *Marlys Bear Medicine v. United States*, 241 F.3d 1208 (9th Cir. 2001).

The panel in Petitioner's case held that event monitoring for compliance with permit stipulations (including those addressing safety) is protected by the discretionary function exception. Pet. App. 12. On March 7, a different panel of the Ninth Circuit held that monitoring (in this case of a timber harvest on Indian Reservation land) was *not* protected by the discretionary function exception to the FTCA. *Marlys Bear Medicine v. United States, supra* (plaintiff fatally injured in course of timber harvesting pursuant to permit of BIA). Thus, the Bureau of Indian Affairs, which, pursuant to its operational manual, regularly inspected the logging site to ensure "adherence to basic policy and forestry practices," was not protected by the discretionary function exception:

> "Even if the BIA did have discretion in its monitoring of the Lone Bear reservation, its actions

> in carrying out its responsibilities are not protected policy judgments and therefore fail to satisfy the second prong of the discretionary function analysis." *Marlys Bear Medicine, supra,* 241 F.3d at 1215.

Although in Petitioner's case there is a mandatory ("shall") duty to suspend the permit for violations or "stipulations providing for the safety or health of the public" (BLM Manual, H-8372-1, VIIC – Pet. App 46-47), in *Marlys Bear Medicine* the relevant provision (this time found in the contract rather than in a manual or regulation) merely stated that "The Superintendent [of BIA] *may* . . . suspend any or all of the Purchaser's operation under the contract if the Purchaser violates any of the requirements of the contract." *Marlys Bear Medicine, supra,* 241 F.3d at 1212 n.2 [Emphasis added]. Although the use of "may" clearly implies choice, the panel held that implementation of safety precautions – in this case through monitoring and the ability to suspend the permit – is not the kind of decision grounded in social, political or economic policy.

In Petitioner's case, the panel held that determination of a safety violation would "necessarily include a discretionary balancing of policy considerations." Pet. App. 14. Moreover, since the record did not disclose that the BLM had "determined a permit violation affecting the public health or safety had occurred," the BLM's conduct was protected by the discretionary function exception. Pet. App. 13. By contrast, in *Marlys Bear Medicine,* the BIA's failure adequately to inspect and manage the logging site, and the failure to ensure that appropriate safety measures were taken, were not protected by the discretionary function exception. *Id.* at 1215. There is no suggestion in the opinion that the BIA determined, or failed

to determine, a violation. This is because, while a "determination" may at some level involve choice, it is not the kind of choice protected by the discretionary function exception.

The panel in Petitioner's case held that suspension of the permit was left to the discretion of the BLM. Pet. App. 14. The panel in *Marlys Bear Medicine* (citing *Routh v. United States*, 941 F.2d 853 (9th Cir. 1991)) held that, merely because the contracting officer "must weigh the effects of shutting the job down versus the benefits of the safety measure," (*id.* at 1215-1216) the decision was not protected by the discretionary function exception. The panel in *Marlys Bear Medicine* arrived at this result despite the implication of choice in the use of "may . . . suspend" in the governing contract provision. *Marlys Bear Medicine, supra*, 241 F.3d at 1212 n.2.

In the present case, the BLM delegated safety measures to Burning Man. In *Marlys Bear Medicine*, the BIA delegated safety measures to the Indian tribe ostensibly for the purpose of "promoting independence in the Indian Tribes." *Id.* at 1216. Unlike the panel in Petitioner's case, the panel rejected even this policy basis as a basis for discretionary function immunity. *Ibid.*

Finally, the panel in Petitioner's case purports to find policy-based discretion in *ex post* assertions in the U.S. attorney's brief of *possible* policy bases for failure to segregate cars and campers, failure to warn participants, and failure temporarily to suspend the permit. In so doing, the government attempts to accept this Court's invitation in *Gaubert* to extend the protection of the discretionary function exception to any choice that is "susceptible to policy analysis." *United States v. Gaubert*, 499 U.S. 315, 324-25 (1991). The panel in *Marlys Bear Medicine*, however,

rejected this approach and rejected "ex post rationalizations by the Government in an attempt to invoke the discretionary function shield." *Marlys Bear Medicine, supra*, 241 F.3d at 1216. As Petitioner argued in the court below (App. Brief 37), any other approach would allow the government administratively to immunize itself from tort liability by hypothesizing possible policy bases for failure to implement on-site, garden-variety safety measures. Although rejecting this argument in Petitioner's case, in *Marlys Bear Medicine*, the panel agreed that "[t]his argument would essentially allow the Government to 'administratively immunize itself from tort liability under applicable state law as a matter of "policy." ' " Citing *McGarry v. United States*, 549 F.2d 587, 591 (9th Cir. 1977). Surely Congress, in adopting the FTCA, did not intend for agencies, especially at the implementation level, to opt out of the FTCA by a mere ex post recitation of possible "policy" bases for decisions.

The juxtaposition of the panel's decision in Petitioner's case with the more recent panel decision in *Marlys Bear Medicine* underscores the arbitrary and unpredictable results invited by this Court's "susceptible to policy analysis" dictum in *Gaubert, supra*. It is an appropriate time to clarify the standards for the discretionary function exception. Petitioner's case is an appropriate one in which to do so.

7. Respondent argues that, since this is an issue of statutory interpretation, there is no reason to clarify this Court's interpretation of the FTCA. Res. 7. This is no more than to say that if this Court got it wrong, or penned a dictum in a regulatory context which is inapposite in a proprietary context, it is up to Congress to get it right. Respondent ignores the reality of the legislative process and the history of the FTCA.

Congress has shown little interest in revisiting the FTCA. The discretionary function exception stands as it was enacted in 1946. Until 1988 the planning level/operational level rule of interpretation held currency. It is as apt to argue that, had Congress preferred the "susceptible to policy analysis, ergo policy based" formula for governmental immunity outside the regulatory sphere, Congress could have adopted it. Congress did not.

This Court cannot sidestep its duty to do its level best to effectuate the Congressional intent. Unlike federal courts in some diversity cases, it does not have the option to certify this difficult issue to Congress for an advisory opinion. Petitioner, Mr. Reed, must live with his future, whatever it holds. But for the FTCA, and the thousands of cases falling under it, the buck stops with this Court.

CONCLUSION

It is respectfully submitted that the Petition should be granted.

Respectfully submitted,

MICHAEL M. SHEA, JR.
Counsel of Record
SHEA & SHEA
A PROFESSIONAL LAW CORPORATION
255 North Market Street
Suite 190
San Jose, CA 95110
(408) 292-2434

ROBERT W. PETERSON
School of Law
Santa Clara University
Santa Clara, CA 95053
(408) 554-4141